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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-6638

ROGER DALLAS ROWBOTHAM,

Petitioner,

- v -

THE STATE OF OKLAHOMA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Oklahoma entered September 17, 1975.

CITATION TO OPINION BELOW

The opinion of the Court of Criminal Appeals of the State of Oklahoma is reported at 542 P.2d 610 (Okla. Cr. App. 1975) and is set out as Appendix A hereto, pp. 1 - 21, infra.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3), petitioner having asserted below and asserting here

deprivation of rights secured by the Constitution of the United States.

The opinion below was reaffirmed on rehearing on November 25, 1975. The time within which a petition for certiorari might be filed was extended by order of Mr. Justice White, dated February 17, 1976, to March 24, 1976, and further extended by order of Mr. Justice White, dated March 15, 1976, to April 23, 1976.

QUESTIONS PRESENTED

1. Does the imposition and carrying out of the sentence of death for the crime of first degree murder under the law of Oklahoma violate the Eighth or Fourteenth Amendment to the Constitution of the United States?

2. Did the exclusion for cause of veniremen on the ground of expressed attitudes toward the death penalty violate petitioner's rights under the Sixth or Fourteenth Amendment to the Constitution of the United States?

3. Was petitioner fully and clearly apprised of his right to counsel and his right against self incrimination as require by the holding of Miranda v. Arizona, 384 U.S. 436 (1966)?

4. Were petitioner's Fifth and Fourteenth Amendment rights violated by prosecutorial comment, unmitigated by corrective instruction, upon his failure to testify?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of Oklahoma Law:

21. Okla. Stat. Ann. §701.1 (1975-76 Supp.)

"Murder in the first degree.

"Homicide, when perpetrated without authority of law and with a premeditated design to effect the death of the person killed, or of any other human being, is murder in the first degree in the following cases:

"1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;

"2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;

"3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing or the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21 Okla. Stat. Ann. §701.3 (1975-76 Supp.)

"Punishment for murder in the first degree -- Instructions regarding lesser and included offenses.

"Every person convicted of murder in the first degree shall suffer death. In the case of a jury trial, the jury shall determine only whether the defendant is guilty or not guilty of murder in the first degree and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death. In a case where a jury trial is waived, and the case is tried to the court, or upon a plea of guilty to the court, upon a finding by the court that the defendant is guilty of murder in the first degree, the court shall enter a judgment and sentence of death. In a jury trial for murder in the first degree, nothing in this section shall preclude the trial judge from instructing the jury regarding lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions; but in every instance where an instruction authorizes the jury to consider lesser and included offenses and lesser degrees of homicide, the judge shall state into the record his reasons for giving the instruction based upon the evidence adduced at trial."

21 Okla. Stat. Ann. §701.5 (1975-76 Supp.)

"Review of judgment and sentence of death.

"The Court of Criminal Appeals when reviewing a judgment and sentence of death shall, in the first instance, determine whether errors of law occurring at trial require reversal or modification, but if the Court shall determine that there are no errors of law in the record requiring reversal or modification, the Court shall then convene for the purpose of reviewing the sentence of death. The Court shall set a date certain for an evidentiary hearing, the purpose of which will be to determine if the sentence of death comports with the principles of due process and equal protection of the law. Upon the hearing the Court shall determine whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

21 Okla. Stat. Ann. §701.6 (1975-76 Supp.)

"Modification of death sentence.

"Should the Court determine that the sentence of death is discriminatory or is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, the Court shall modify the sentence of death to life in the penitentiary at hard labor."

STATEMENT

Petitioner was convicted after a jury trial in the District Court of Rogers County, Oklahoma of the murder, on February 15, 1974, of Mrs. Beverly Meeker in the course of an attempted rape.

The State's principal evidence consisted of the testimony of two law enforcement officers who related oral statements given to them by petitioner after he had been arrested and advised of his rights, had consulted with his father and his wife and had signed the following waiver form:

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this same right to the advice and presence of a lawyer, even if you cannot afford to hire one. We cannot ourselves furnish you a lawyer, but one will be appointed for you, if you wish, when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.
>
> WAIVER
>
> "I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me."

(State's Exhibit __).

Undersheriff Hanby testified that petitioner

> ". . . advised us he was headed toward work, he passed and followed several cars that had men in them, and Beverly Meeker's car when it came by saw that she was alone, he turned around and

followed her approximately two miles. At this time he stated that he pulled up along the side of her, honked his horn, pointed down to her tires and then forced her off the road. At this time he said he got out of the car, run up to the passengers side, got into the car with his knife open, put it up to her throat, and told her to drive to the boat ramp. He said he showed her how to drive to the boat ramp. Drove across the river east approximately nine tenths of a mile where he forced her off the road, drove approximately 1 mile back down to the boat ramp, which is approximately one mile sir. He said then that he forced her to disrobe, that he had intentions of raping her, and at this time she started struggling and that is when he stuck her with the knife."

(T.126-27).

Officer Johnson testified that petitioner admitted that "he had taken the life of the victim, Beverly Meeker , I then asked him why he did it, and his reply was that he guessed the devil made him do it." When asked to go with officers to the scene of the crime, petitioner

"pointed out, the positions and vinicity [sic] in which he had stopped the victim's car on the morning of the 15th, stating that he had been west bound on 33 highway that morning, somewhere around eight o'clock give or take a few minutes. And that he had passed several cars and finally had observed the victim proceeding east bound. He stated that he turned around and followed her for approximately 2 miles before he finally ran her car, run up beside her car, motioned her off the road, at which time she pulled off, he stated he then positioned his own car behind the victim's car, got out of his car, went up unlock [sic] the passenger door and took a pocket knife which he had in his pocket, and at that time forced the victim, Mrs. Meeker to drive to the boat ramp area which is located on the east side of the Verdigris River navigation project there, it is approximately 350 or 400 yards south of the roadway. . . . He stated that he then forced Mrs. Meeker to disrobe, I asked him at that time what his intentions were, he stated his intentions were to have sexual intercourse with her.

Q. Is that what he said?

A. No sir. His exact words, he said, I intended to fuck her. At that time he stated that the victim started removing her clothing and that during the removal of her clothing a struggle developed between he and she, at which time he stabbed the victim with the pocket knife he had. He stated that he became frightened after stabbing the victim he fled from the car and ran back to his own vehicle. He stated then -- I then asked him what he did with the murder weapon, he stated that upon arriving back at his own automobile that he had taken and thrown the weapon off the south side of the roadway back toward the clump of large trees, approximately a 100 yards south of the roadway south. I asked him to point out the general direction to us, and he stated that the last time he saw the knife it was in a curve back away from the river towards the west and he did see the knife land in the position uh, itself, but he could tell us it was somewhere between a 100 and 200 yards west of the west bank of the river itself. I asked Mr. Rowbotham also that if he had any conversation or met up with anyone while he was out there on the 15th and he stated that a man in a red truck had stopped by and he had a short conversation with him."

(T.155-56).

In addition, the State presented testimony of a co-worker of Mrs. Meeker who stated that the victim had left her job as a nurse at St. John's Hospital at 7:15 or 7:30 on the morning of February 15. (T.19-20.) Petitioner's father testified that he had seen his son's car parked on the side of highway 33 near the Verdigris Bridge at approximately 8:00 on the morning of the fifteenth. (T.24.) He removed the keys from the car, went to pick up his pay check in a nearby town, and returned approximately one hour later. Upon his return, he found his son sitting in the car. "He just said, 'you got my key didn't you', and I said 'yes, I did'. He said, he saw me go by the station, he said he was at the station." (T.25.) The father then went to call petitioner's wife who had been asked to bring another key and petitioner drove

toward his home. (T.27.)

George Shrier, a local farmer, noticed a red pickup truck parked on the highway and drove with his wife to investigate. (T.29-31.) Finding the truck empty they turned to leave and noticed a car parked on a boat ramp. (T.32.) In that car they discovered a person slumped over the steering wheel; returned home and called the local sheriff. (T.34.) Mr. Shrier estimated the time of the discovery as 9:45 a.m. (Id.)

Paul Kroker was driving on highway 33 at about 8:00 a.m. when he saw petitioner's dark green Pontiac parked on the side of the road. (T.52-53.) He saw a man near the car, but was unable to identify him. (Id.) At the same time he observed an old model red pickup truck. (T.54.)

Jimmy Williams testified that he had been driving a red pickup truck in the vicinity at about 8:30 a.m. (T.57-58) when he saw a dark green Pontiac on the side of the road and a man walking toward it (T.58). He stopped, thinking the driver needed help. (Id.) Mr. Williams identified petitioner as the man he had seen walking toward the car (T.61) and testified that he was carrying a pocket knife exactly like a knife found on February 21 near the area in which petitioner said in his February 16 statement that he had thrown it. (T.62-63, 128-29, 145.) Petitioner told Mr. Williams that his father had taken his keys and asked if he knew how to "hot wire" a car. The witness answered that he did not and drove away. (T.60.)

A shirt, a pair of pants and boots that petitioner had worn on February 15,and on February 16, the day of his arrest, were introduced. (T.231.) The shirt was thought by arresting

officers to have blood stains on it (T.108); a photograph of a footprint taken on February 18 at the scene of the crime was identified by an officer who testified that it had rained on February 15; the weather had been fair on the 16th and 17th, and that it had begun to rain as officers finished taking the photographs on February 18. (T.75-76.) Petitioner was arrested at his place of employment (T.104) where police officers obtained his time card (T.105) which had been clocked in at 10:00 a.m. on February 15, although petitioner's working hours were 8 a.m. to 5:30 p.m. (T.84).

Officers summoned as a result of Mr. Shrier's call found the victim's body nude with a brown coat draped over it. (T.103.) An autopsy revealed that the cause of death was a stab wound to the neck. (T.165.) A total of five stab wounds were found, two of which were thought by the examining pathologist to have been caused by "a bladed instrument" (T.166) and three which appeared to have been caused by a different kind of weapon (T.166). Although there was nothing in the record to suggest that the State's evidence could have been contradicted in any manner other than the presentation of testimony by petitioner, the prosecutor stated in his closing argument: "Ladies and Gentlemen, bear this in mind. The evidence presented by the state has gone uncontradicted." (T.213.) Defense counsel's objection was overruled. (Id.)

The jury was instructed only as to the crime of first degree murder; it found petitioner guilty and fixed his punishment at death. (T. 217, 219-20.) Petitioner was sentenced in accordance with that verdict on July 24, 1974.

Five prospective jurors had been excused for cause because of their views, of various strengths, regarding the death penalty and their ability to impose it. (Transcript of Voir Dire, pp. 34-35, 149, 195, 229, 223.)

HOW THE FEDERAL QUESTIONS WERE RAISED AND DECIDED BELOW

In his brief on appeal to the Oklahoma Court of Criminal Appeals, petitioner alleged, as propositions II, III and IV, error of the trial court in failing to sustain his motion to suppress, and objection to a defective rights waiver and in admitting an illegally obtained confession. As proposition V he alleged error in the trial court's refusal to strike comment by the prosecuting attorney on petitioner's failure to testify. By application dated May 13, 1975, petitioner sought leave to assert, and submitted argument in support of, his contentions that "venireman Helt was improperly excused for cause" because she had a doubt that she could assess the death penalty and that "[t]he Oklahoma First Degree Murder statute does not meet the standards of Furman v. Georgia." All of these contentions were explicitly rejected by the Court of Criminal Appeals, Rowbotham v. State, 542 P.2d 610, 616-19, 620, 622-23, 623 (Okla. Cr. App. 1975).

REASONS FOR GRANTING THE WRIT

I

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF FIRST DEGREE MURDER UNDER THE LAW OF OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner's contentions that the laws under which he was convicted and sentenced fail to preclude arbitrary infliction of the death penalty, and that this is so largely because those laws are excessive, regressive and inconsistent with contemporary standards of decency, are presented by incorporation of pages 10 - 16 and 20 - 38 of the Reasons for Granting the Writ Section of the petition for Certiorari in Green v. Oklahoma, No. 75-6451. That section is attached as Appendix B.

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE EXCLUSION FOR CAUSE OF VENIREMEN ON THE GROUND OF THEIR EXPRESSED ATTITUDES TOWARD THE DEATH PENALTY VIOLATED PETITIONER'S RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

During the selection of petitioner's jury, five panel members were excluded because of their expressed attitudes toward the death penalty. In holding that even the most questionable of these exclusions was not error, the Court of Criminal Appeals relied upon its holding in Justus v. State, 542 P.2d 598 (Okla. Cr. App. 1975). Rowbotham v. State, supra, 542 P.2d at 622-23. Justus held that "the applicability of Witherspoon is limited to those cases where, upon conviction for the offense charged, the jury has discretion to resolve whether the defendant shall suffer death or some lesser degree of punishment," id. at 603. The Justus court deemed a state-law "bias" test the appropriate standard for determining whether veniremen were properly excluded on account of their death penalty scruples in a capital case:

> "The inapplicability of Witherspoon to the present case, however, does not mean that the exclusion for cause of jurors antagonistic to capital punishment is without standard. In such cases, the appropriate basis for challenge may be for implied bias or actual bias to the extent that the personal scruples or opinions of a venireman will not

yield to what the Legislature has determined to be the law." 1/

The application of this standard represents a fundamental misapplication of Witherspoon v. Illinois, 391 U.S. 510 (1968).

The basic question presented here is the extent to which the State is empowered to sweep from the jury those veniremen with conscientious scruples against the death penalty under capital trial procedures in which the jury does not make a separate determination of sentence after it has ascertained guilt. The court below clearly applied a standard, see note 1 supra, which allows the exclusion of veniremen on account of

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1/ The court defined this state-law standard as follows:

"With respect to implied bias, 22 O.S. 1971, §660, provides, in pertinent part:

> 'A challenge for implied bias may be taken for all or any of the following cases, and for no other:
> * * *
> 8. If the offense charged be punishable with death, the entertaining of such conscientious opinions as would preclude his finding the defendant guilty of, in which case he shall neither be permitted nor compelled to serve as a juror.'

Regarding challenge for actual bias, 22 U.S. 1971, §659, provides in pertinent part:

> 'Particular causes of challenge are of two kinds:
> * * *
> 2. For the existence of a state of mind on the part of the juror, in reference to the case, or to either party, which satisfies the court, in the exercise of a sound discretion, that he cannot try the issue impartially, without prejudice to the substantial rights of the party challenging, and which is known in this chapter as actual bias.'"

Justus v. State, supra, 542 P.2d at 605.

their feelings concerning the death penalty upon a "broader basis" than the standard which Illinois was held to have violated in Witherspoon, 391 U.S. at 522 n. 21.

Witherspoon is fully applicable to a death penalty procedure such as Oklahoma's (as a number of state courts have held, see People v. District Court, Col. Sup. Ct. No. 27078 (March 11, 1976); Hovila v. State, Tex. Ct. Crim. App. No. 49,396 (April 30, 1975); Owens v. State, ___ Ga. ___, 214 S.E. 2d 173 (1975); State v. Trivitt, New Mexico Sup. Ct. No. 10,159 (Feb. 17, 1976); State v. Noell, 284 N.C. 670, 202 S.E.2d 750 (1974); and see State v. Britt, 285 N.C. 256, 204 S.E.2d 817 (1974)) for two reasons. First, although the primary focus of the Witherspoon decision was on the jury's pre-Furman role of "determin[ing] whether [a defendant's] . . . sentence should be imprisonment or death," Witherspoon v. Illinois, supra, 391 U.S. at 518 (footnote omitted), the Court also laid down standards for exclusion of jurors whose death-penalty scruples might interfere with their determination of the separate question of guilt or innocence. The Court noted that:

> "statutes and rules disqualifying jurors with scruples against capital punishment are often couched in terms of reservations against finding a man guilty when the penalty might be death . . . . Yet, despite such language, courts . . . have sometimes permitted the exclusion for cause of jurors opposed to the death penalty even in the absence of a showing that their scruples would have interfered with their ability to determine guilt in accordance with the evidence and the law. See, e.g., . . . Smith v. State, 5 Okla. Cr. 282, 284, 114 P. 350, 351."

Witherspoon v. Illinois, supra, 391 U.S. at 513 n.5 (emphasis in original). The Court ruled that before veniremen could be

excluded on the ground that their death penalty scruples made them biased on the issue of guilt, it must be "made unmistakably clear . . . (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt." Witherspoon v. Illinois, supra, 391 U.S. at 523 n.22 (emphasis omitted).

Second, the distinction of Witherspoon offered by the Court of Criminal Appeals -- that "the jury no longer acts as 'arbiter of the punishment to be imposed' but is limited to a determination of guilt or innocence," 542 P.2d 605 -- proves either too much or too little. If the court is saying that attitudes regarding capital punishment can play no part in a jury's determination of guilt or innocence of a capital crime, then Oklahoma manifestly has no business death-qualifying jurors at all. But if, as the death-qualification practice approved below attests, attitudes concerning the death penalty can affect jurors' votes on guilt or innocence (or on degree) -- and if a State undertakes to exclude jurors for this very reason -- then a jury selected by the systematic exclusion of death-scrupled jurors is something other and less than a jury representative of the whole community in regard to the questions which the jury must decide. The point, of course, is that under Oklahoma's post-Furman procedure the jury acts simultaneously to determine both guilt and punishment.[2] While Witherspoon may allow the

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2/ This point applies with even greater force with regard to the Oklahoma death penalty statute than with regard to the typical "mandatory" death penalty statute. For the Oklahoma juror is required to include in any capital verdict an affirmative statement "that the defendant shall suffer death." 21 Okla. Stat. Ann. §701.3 (1975-76 Supp.). Although the Court of Criminal Appeals has indicated that a failure to do so would not have the

exclusion of veniremen who are demonstrably biased, under an appropriate standard, against the imposition of the death penalty, Witherspoon also specifies in terms the minimally acceptable constitutional standard for exclusion: it must be made "unmistakably clear . . . that . . . [the excluded jurors] would automatically" reject a verdict carrying the death penalty. Witherspoon v. Illinois, supra, 391 U.S. at 523 n.22 (emphasis omitted).

The difference between the state-law "bias" test and the Witherspoon test for exclusion of death-scrupled jurors is that the former creates a presumption of excludability from the uncertainty of a venireman as to his views or from his inability to state unequivocally whether he could return a verdict whose consequence was death:

> "a challenge for cause is appropriate to the extent that the venireman is equivocal and uncertain regarding his capacity to follow the law and honor the oath of a juror . . . . Clearly, no prospective juror with animosity concerning the death penalty should be excused upon this basis if able to set aside personal beliefs or attitudes and fulfill the oath to try the case impartially according to the law and the evidence. However, if satisfied of the defendant's guilt beyond a reasonable doubt, a venireman is unresolved as to whether he could then assess the death penalty, or knowing the

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2/ Continued

legal effect of sparing the defendant's life, Williams v. State, 542 P.2d 554, 578 - 579, the provision stands to complicate the moral delimna of the death scrupled but conscientious juror by apparent overlap of the sentencing and guilt determination processes, and to invite voir dire interrogation regarding the ability to impose a sentence of death rather than the ability to return a verdict of guilt consistent with the evidence, regardless of the knowledge of future sentencing consequences.

> death penalty to be mandatory upon conviction, he is uncertain whether he could stand indifferent between the defendant and the State in deliberating his verdict according to the law and the evidence, then he has to that extent forewarned the court that he is undecided whether he could comply with the oath of a juror. A challenge for cause should be granted against such a venireman."

Justus v. State, supra, 542 P.2d at 607. Witherspoon, however, requires that a venireman's sentiments be made "unmistakably clear" before he may be excluded for cause; and in Funicello v. New Jersey, 403 U.S. 948 (1971), this Court applied Witherspoon to invalidate precisely the same "equivocal and uncertain" ground of exclusion adopted by the Court of Criminal Appeals here. See Forcella and Funicello v. State, 52 N.J. 263, 245 A.2d 181 (1968).

It is evident that venirewoman Helt did not make it "unmistakably clear" that her opposition to the death penalty would make it impossible for her to make an impartial decision concerning petitioner's guilt. Ms. Helt stated that she had no quarrel with the Oklahoma capital punishment law and stated that she believed in capital punishment. (T.195.) The only basis for her exclusion was her affirmative answer to the question "Do you have some doubt in your mind, as to whether you could assess [3/] the death penalty." (Id.) No further inquiry was made as to her ability to follow the law.

3/ See note 2, supra, and compare the following statement of the Court of Criminal Appeals in Justus v. State:

> "With respect to the imposition of the death penalty, the 'conscience of the community' is . . . embodied in the . . . [mandatory death penalty] provision enacted by the duly elected representatives of the people, and in such cases the jury no longer acts as 'arbiter of the punishment to be imposed' . . ."

542 P.2d at 605.

The exclusions of the other four veniremen[4] were made on the basis of equally perfunctory, equally inadequate inquiry and were unjustifiable under any proper application of the Witherspoon standard. Ms. Byler was questioned as follows by the prosecution:

> "I anticipate that you will be instructed in this case that if you feel that the state has met its burden to prove that the defendant Roger Rowbotham is in fact guilty of the crime of first degree murder it would be your duty as a juror under oath to return a verdict of guilty and the punishment for first degree murder, Mrs. Byler is death in the electric chair. Do you feel you are qualified to sit on a jury of this nature."

(T.34.) Her answer was "Well, I don't feel like I could." (Id.) When asked whether she could "follow the law and send a man to the electric chair," she responded that it was a "hard question. (T.34-35.) The prosecutor then said "You don't feel like you could sentence a man to the electric chair,"[5] she said "No, I don't, because I don't feel like that I could take what I can't give . . ." (T.35.) She was excused without further questioning. (Id.)

4/ Although the brief and petition in error below discussed only the Helt exclusion, the Court of Criminal Appeals addressed the broader assertion that "the death sentence could not be imposed because the jury was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction, in violation of Witherspoon . . . ." Rowbotham v. State, supra, 542 P.2d at 622.

5/ See note 3, supra.

Ms. Faught stated that she did not "believe in capital punishment." (T.149.) The prosecutor then said "You could not return a verdict of guilty knowing the punishment would be death in the electric chair." (Id.) Her negative answer resulted in exclusion without further inquiry.

Ms. Lowther was asked if she had ever served on a jury before and answered that she had not. (T. 229.) When asked if she were "willing to accept such a responsibility," she asked, "You mean send somebody to the electric chair." [6/] (Id.) The prosecutor said "Yes maam," and Ms. Lowther replied "No I am not." She was excused without further questioning and without being enlightened as to the role and duties of a juror in a capital case.

Ms. Petty was questioned as follows by the state:

> "Do you feel you could sit on this type of case and all the jurors who have never served on a jury before who feel they could follow the instructions, do you feel you could sit on this type of case a capital case, and listen to the evidence and once you felt the State met its burden and proved the defendant guilty beyond a reasonable doubt, do you feel you could return a verdict of guilty knowing that his punishment would be the extreme penalty."

(T. 233.) Her negative answer resulted in immediate exclusion although she had earlier stated that she had never before considered the question whether she "believe[d] in capital punishment." (Id.)

The right of a capital defendant to a fair and impartial trial in which the "scales . . . are not deliberately tipped toward death," Witherspoon v. Illinois, supra, 391 U.S.

6/ See note 3, supra.

at 522 n.20, is fundamental:

> "the jury-selection standards employed here necessarily undermined 'the very integrity of the . . . process' that decided the petitioner's fate . . . and we have concluded that neither the reliance of law enforcement officials . . . nor the impact of a retroactive holding on the administration of justice . . . warrants a decision against the fully retroactive application of the holding we announce today."

Witherspoon v. Illinois, supra, 391 U.S. at 523 n.22. The Court should grant certiorari in this case to determine whether Oklahoma has not impermissibly diluted a capital defendant's right to a jury selected in accordance with Witherspoon's requirements.

III

THIS COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PETITIONER WAS ADEQUATELY ADVISED OF, AND ABLE TO INTELLIGENTLY WAIVE, HIS RIGHT TO COUNSEL AND HIS RIGHT AGAINST SELF INCRIMINATION.

Petitioner was orally advised of his rights on two separate occations and signed a rights waiver; in each case the following language was used:

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this same right to the advice and presence of a lawyer, even if you cannot afford to hire one. We cannot ourselves furnish you a lawyer, but one will be appointed for you, if you wish, when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer."

(T. 109, 118.)

The trial court admitted into evidence, over defense objection, testimony by police officers regarding self incriminating statements made by petitioner. The Court of Criminal Appeals of Oklahoma, reversing its holding in two previous cases,[7] found that the above rights waiver satisfied the mandate of Miranda v. Arizona, 384 U.S. 436 (1966). Federal and state courts are divided as to whether warnings that advise of some in futuro right to counsel satisfy the requirements of Miranda. Justice Douglas, dissenting from the denial of certiorari

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7/ Reese v. State, Okla. Cr., 462 P.2d 331 (1969); Schorr v. State, Okla. Cr. 499 P.2d 450 (1972).

on this issue in Wright v. North Carolina, 415 U.S. 936 (1974), urged the Court to provide "uniformity on such an important federal constitutional question."

Courts of Appeals for the Seventh, Ninth and Tenth Circuits[8] have concluded that warnings similar to those given petitioner are inadequate compliance with Miranda. In Williams the Court found that the warning failed to convey to the indigent the knowledge that he also had the right to counsel present at the time of interrogation.

> "We hold that the warning given here was not an 'effective and express explanation;' to the contrary, it was equivocal and ambiguous. In one breath appellant was informed that he had the right to appointed counsel during questioning. In the next breath, he was told that counsel could not be provided until later. In other words, the statement that no lawyer can be provided at the moment and can only be obtained if and when the accused reaches court substantially restricts the absolute right the counsel previously stated; it conveys the contradictory alternative message that an indigent is first entitled to counsel upon an appearance in court at some unknown, future time. The entire warning is therefore, at best, misleading and confusing and at worst, constitutes a subtle temptation to the unsophisticated, indigent accused to forego the right to counsel at this critical moment."

Williams v. Twomey, supra, 407 F.2d at 1250. Both the Ninth and Tenth Circuts found the warning internally inconsistent and lacking sufficient clarity to inform the accused of his right to a court appointed attorney at the time the statement was made.

8/ Williams v. Twomey, 467 F.2d 1248 (CA7 1972); U.S. v. Garcia, 431 F.2d 134 (CA9 1970); Coyete v. U.S., 380 F.2d 305 (CA10 1967).

Courts of Appeals in the Second, Fourth, Fifth and Eighth Circuits[9] have taken the view of the Oklahoma Court in holding such warnings adequate. These decisions find the Miranda requirements met as long as the accused is informed that he has the right to the presence of an attorney and that he need not talk until an attorney is appointed.

State courts in Alabama, Arkansas, Idaho, Kansas and Washington[10] find the warnings insufficient while Illinois, Indiana, Michigan, Mississippi,[11] and now Oklahoma have reached a contrary result.

This Court should grant certiorari to determine whether the warnings given petitioner are sufficient to secure the Fifth and Sixth Amendment rights guaranteed by Miranda despite their misleading suggestion to the indigent defendant that the right to counsel exists only in theory until such time as he is taken to

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9/ Massimo v. U.S., 463 F.2d 1171 (CA2 1971), cert. denied 409 U.S. 1117 (1973); Wright v. North Carolina, 483 F.2d 405 (CA4-1973), cert. denied, 415 U.S. 936 (1974); United States v. Lacy, 446 F.2d 511 (CA5 1971); Klinger v. United States, 409 F.2d 299 (CA8 1969).

10/ Square v. State, 283 Ala. 548, 219 So. 2d 377 (1968), Moore v. State, 251 Ark. 436, 472 SW.2d 940 (1971), State v. Grierson, 95 Idaho 155, 504 P.2d 1204 (1972) (dicta), State v. Carpenter, 211 Kan. 234, 505 P.2d 752 (1973), State v. Creach, 77 Wash. 2d 194, 461 P.2d 329 (1969).

11/ People v. Williams, 131 Ill. App. 2d 149, 264 NE.2d 901 (1970), Jones v. State, 253 Ind. 235, 252 NE.2d 572 (1969). People v. Campbell, 26 Mich. App. 196, 182 NW.2d 4 (1970, cert. denied, 401 U.S. 945 (1971), Evans v. State, 275 So.2d 83 (Miss. 1973), People v. Swift, 32 App. Div. 2d 183, 300 NYS.2d 639 (1969), cert. denied, 396 U.S. 1018 (1970).

Court.[12]

IV.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PROSECUTOR'S COMMENT UPON PETITIONER'S FAILURE TO TESTIFY, UNMITIGATED BY CORRECTIVE INSTRUCTION, UNCONSTITUTIONALLY PENALIZED HIS EXERCISE OF THE FIFTH AMENDMENT RIGHT TO REMAIN SILENT AND DENIED HIS RIGHT TO A FAIR TRIAL.

After reviewing the State's evidence in closing argument, the prosecutor made the following statement:

> "And Ladies and Gentlemen, bear this in mind. The evidence presented by the State has gone uncontradicted."

(T.213.) There is nothing in the record to indicate that pertinent prosecution evidence could have been rebutted in any manner other than testimony by petitioner. Objection to the remark was overruled and no corrective instruction was given. State courts have ruled differently regarding similar prosecutorial conduct,[13] and federal circuit courts have held it improper.

12/ The alternate holding of the Court of Criminal Appeals that Miranda was inapplicable because the statement was "wholly volunteered and not at all the product of police pressure," Rowbotham v. State, supra, 542 P.2d at 619, wholly misinterprets the requirements of Miranda. Petitioner had been arrested for "Investigation of Murder" and read the rights set forth at page 22, supra (T.104-05); questioned about his clothing (T.151) confronted with the information that his car had been seen at the scene of the homicide (T.153) and, according to the testimony of one of the arresting officers, "asked . . . if he would be willing to return to the scene where the crime was committed, and relate to us exactly what had occurred" (T.154). There can be no question that the statements relied upon by the state at trial were the product of "custodial interrogation" within the meaning of Miranda.

13/ Compare State v. Sherman, ___ R.I. ___, 317 A.2d 445 (1974); Commonwealth v. Davis, 452 Pa. 171, 305 A.2d 715 (1973); People v. Vargas, 108 Cal. Reptr. 15, 509 P.2d 959 (1973); Jones v. State, 260 So.2d 279 (Fla. 1972); Rowley v. State, 259 Ind.

Comment on a defendant's refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' . . . which the Fifth Amendment outlaws," Griffin v. California, 380 U.S. 609, 614 (1965), because it "cuts down on the privilege by making its assertion costly," Ibid.

Such comment on the part of the prosecutor "even by implication is improper" and an infringement of "[d]efendant's right not to testify." Rodriques-Sandoval v. United States, 409 F.2d 529, 531 (C.A. 5, 1969). In Desmond v. United States, 345 F.2d 225 (C.A.1, 1965) the prosecutor said in closing argument

> "Those are the facts, the evidence. Incidentally, may I say to you that the evidence stands unimpeached and uncontradicted."

Id. at 226. Objection to the comment was overruled, but the court subsequently charged that "no inference should be drawn against appellant from his failure to take the stand." Ibid. The court found "infringement of a constitutional right" since it was not "apparent on the record that there was someone other than himself whom the defendant could have called:"

> "The government made the argument because it thought it would be effective. We can think of no effect other than to invite the jury's attention to the fact the defendants had not taken the stand."

Id. at 227.

13/ Continued

209, 285 N.E. 2d 646 (1972); Padgett v. State, 45 Ala. 56, 223 So.2d 597 (1969); State v. Hart, 462 P.2d 885 (Mont. 1969); State v. Sinclair, 49 N.J. 525, 231 A.2d 565 (1967); People v. Gould, 267 N.Y.S. 2d 966, 25 A.D. 2d 160 (1966); Chatman v. State, 145 So. 2d 707 (Miss. 1962); Watson v. State, 352 S.W. 2d 120 (Tex. Cr. App. 1961) with State v. Messinger, 509 P.2d 382, 8 Wash. App. 829 (1973); State v. Dymond, 110 N.H. 228, 265 A.2d 9 (1970); People v. Jackson, 116 Ill. 86, 253 N.E. 2d 624 (1969).

This Court has held that the Fifth and Fourteenth Amendments forbid "comment by the prosecution on the accused's silence." Griffin v. California, supra, 380 U.S. at 615. Certiorari should be granted to assure that defendants do not suffer effective denial of the right so secured by prosecution statements which may be construed as "attempts to define exactly the edge of the precipice," Rodriguez-Sandoval v. United States, supra, 409 U.S. at 531, but which clearly imply to the jury that the failure to testify creates a presumption of guilt.

CONCLUSION

Petitioner prays that the petition for a writ of certiorari be granted.

Respectfully submitted,

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ATTORNEYS FOR PETITION

APPENDIX A

FILED
IN COURT OF CRIMINAL APPEALS
SEP 18 1975
Ross Rowland, Jr.
CLERK

IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

ROGER DALLAS ROWBOTHAM,
Appellant,
-vs-
THE STATE OF OKLAHOMA,
Appellee.

FOR PUBLICATION

No. F-75-44

AUTHORIZED FOR FILING
SEP 18 1975
COURT OF CRIMINAL APPEALS

- O P I N I O N -

BLISS, Judge:

Appellant, Roger Dallas Rowbotham, hereinafter referred to as defendant, was charged, tried and convicted in the District Court, Rogers County, Case No. CRF-74-43, for the offense of Murder, First Degree, in violation of 21 O.S. Supp. 1974, § 701.1, ¶2. In accordance with the provisions of 21 O.S. Supp. 1974, § 701.3, the defendant was thereafter sentenced to suffer death, and from said judgment and sentence a timely appeal has been perfected to this Court.

Mary Rossi testified she was a registered nurse at St. John's Hospital in Tulsa, Oklahoma, and that she was so employed on the 15th of February, 1974, on which day she worked from 6:30 a.m. to 3:00 p.m. She testified that she had known the decedent, Beverly Meeker, as Mrs. Meeker was also a registered nurse at the same hospital on February 15. She had conversed with the decedent on the morning of February 15, and the decedent appeared to be in good health. Mrs. Meeker had worked the 11:00 p.m. to 7:00 a.m. shift and she left for home at approximately 7:15 a.m. on that morning.

Willie Rowbotham testified that he was the father of the defendant who he had seen on the morning of February 15, at the Verdigris River Bridge on Highway 33. He stated that at approximately 8:00 a.m. on that morning he was driving to Tulsa when he observed the defendant's car parked at the side of the road. Upon stopping, he found the car unattended with the keys in the ignition. He took the keys with him and returned about one hour later finding the defendant sitting in the

car at which time he lectured defendant about leaving keys in an unattended car. He further testified that he accompanied the defendant to a nearby service station to call his (defendant's) wife to instruct her that she need not bring him a car key.

George Shirer testified he lived on old Highway 33 approximately one-half mile from the Verdigris River and had resided at that location for about five or six years. On the morning of the 15th of February, 1974, after having breakfast at approximately 8:00 a.m., he and his wife left their house to feed his cattle and upon returning from feeding the cattle he noticed an unoccupied pickup on the northwest side of the highway. He also observed a car parked near the boat ramp very close to the river. Upon investigation he observed a person slumped over the steering wheel and observed blood on the person's arm. Thereafter he notified the authorities.

Paul Kroker testified that on the morning of February 15, 1974, while hauling eggs from Chouteau to Tulsa on Highway 33, he observed a dark green Pontiac and a pickup parked on the side of Highway 33 at the Verdigris River. He observed one individual in the pickup and someone standing beside the car.

Jimmy Williams testified that on the 15th of February, 1974, he was employed in Tulsa and at approximately 8:30 that morning he was in the vicinity of the Verdigris River and Highway 33. He stated that upon crossing the river bridge he observed a man walking up the bank from the river to a green Pontiac with a dark top which was parked on the left side of the highway. Thinking that the man had car trouble, he turned around and returned to the parked car to offer assistance, whereupon the man told him that his father had taken his car keys. He then identified in court the defendant as that individual. He further testified that after offering assistance to the defendant on that morning he observed the defendant to have, in his hand, a pocket knife which was approximately three to three and one-half inches in length. Upon being shown State's Exhibit No. 1, a pocket knife, he testified said exhibit resembled the knife he had seen in the defendant's hand on that morning.

Benny Dirck testified he was employed as the Deputy Sheriff of

Rogers County and had been so employed for approximately five and one-half years. While in that capacity he participated in the investigation of the case, State versus Rowbotham. Upon being shown State's Exhibit No. 2 and No. 3, photographs of footprints, he testified that these photographs had been taken on the 18th of February, 1974, in the area where the decedent's body was found. The photographs were taken in his presence and they accurately depicted the scene on that day. The photographs were then admitted into evidence.

T. J. Smith testified he was employed as Assistant Superintendent for Mid-Con Fabricators for the Port of Catoosa and was so employed on the 15th of February, 1974. He testified that the defendant had been employed with the firm for three to four weeks and his working hours had been from 8:00 a.m. to 5:30 p.m. The firm's procedure for reporting to work consisted of punching a time card. The witness was then shown and identified State's Exhibit No. 4, defendant's time card dated February 15, 1974, which had been punched in at between 10:00 and 10:06 a.m. Thereafter, the card was admitted into evidence.

J. B. Hamby testified he was employed as the Undersheriff of Rogers County and had been so employed intermittently for ten years. While so employed he was in the vicinity of the Verdigris River and Highway 33 on February 15, 1974, at approximately 10:00 a.m. He stated that he went there in response to a call and found Officer Jim Clark already at the scene. He observed a 1970 Chevrolet parked facing the water with a woman inside slumped over, clothed in a brown coat under which she was nude. He observed that the woman's throat was slashed and she had no pulse. A photographer was called who took photographs and thereafter, at approximately 11:30 a.m., the body was taken from the scene to the Health Center in Claremore. Later, the body was taken to the Oklahoma Osteopathic Hospital in Tulsa, Oklahoma, where an autopsy was performed. Upon being shown State's Exhibits No. 5, 6 and 7, photographs of the car in which decedent was found, and two photographs of the decedent as she was found in the car slumped to the left, he stated said photographs accurately and truly represented the scene as depicted therein. Thereafter, said exhibits were admitted into evidence. On

the 16th day of February, at approximately 12:40 p.m., he, with the assistance of Sergeant Larry Johnson and Bill Mitchell, Chief Criminal Investigator for Osage County, went to the Port of Catoosa and arrested the defendant on suspicion of murder. Upon arresting the defendant, he and Sergeant Larry Johnson advised the defendant of his rights according to the Miranda decision, specifically stating that Officer Johnson read the defendant his rights from his "little Miranda card." He then identified State's Exhibit No. 4, a time card belonging to the defendant, which had been given him by T. J. Smith. Upon being shown State's Exhibit No. 10, an army jacket, State's Exhibit No. 11, a shirt, State's Exhibit No. 12, a pair of pants, and State's Exhibit No. 13, he testified said clothing was the same clothing the defendant was wearing the day of the arrest and they were removed as there appeared to be blood on the shirt. At the police station the defendant signed a rights waiver which was marked State's Exhibit No. 8, and later admitted into evidence. After the defendant signed the rights waiver at 2:30 p.m., and before interrogation, he requested he be allowed to talk with his wife and father, which request was granted, whereafter the defendant's wife and father arrived at approximately 5:00 p.m. After conversing with them for 30 minutes, the defendant voluntarily told the officers he was ready to talk and he admitted killing the decedent, Beverly Meeker. The witness further testified that the defendant thereafter agreed to return to the scene of the crime with the officers at which time the defendant related the incident as follows:

> "He advised us he was headed toward work, he passed and followed several cars that had men in them, and Beverly Meeker's car when it came by saw that she was alone, he turned around and followed her for approximately two miles. At this time he stated that he pulled up along the side of her, honked his horn, pointed down to her tires and then forced her off the road. At this time he said he got out of the car, run up to the passengers side, got into the car with his knife open, put it up to her throat, and told her to drive to the boat ramp. He said he showed her how to drive to the boat ramp. Drove across the river east approximately nine tenths of a mile where he forced her off the road, drove approximately 1 mile back down to the boat ramp, which is approximately one mile sir. He said then that he forced her to disrobe, that he had intentions of raping her, and at this time she started struggling and that is when he stuck her with the knife." (Tr. 126-127)

He stated that the defendant then showed them the general vicinity where he had disposed of the knife by throwing it into some trees. The knife was found on the 21st of February by Dr. Keith P. Sutton while assisting Officer Dirck and another in searching the area. He stated he was present when the knife was found and he was also present when photographs were taken of the knife. He observed Dr. Sutton place an "X" on the end of the knife and, upon being shown State's Exhibit No. 1 and State's Exhibit No. 14, he identified said exhibits as being the knife which was found and the photographs which were taken of the knife, respectively. Thereafter, State's Exhibits Nos. 9, 10, 11, 12 and 13, were admitted into evidence. On being shown State's Exhibit No. 15, pantyhose, State's Exhibit No. 16, a slip, and State's Exhibit No. 17, a dress, he testified that said clothing was found pulled down on the right leg of the decedent on February 15. Thereafter, these exhibits were admitted into evidence.

Keith Sutton testified he was a physician and had participated in a search for a knife. On being shown State's Exhibit No. 1 and State's Exhibit No. 14, he identified said exhibits as the knife he had found and a photograph of that same knife, respectively.

Larry Johnson testified he was employed with the Tulsa Police Department and that he arrested the defendant on the 16th of February, 1974, at Mid-Con Fabricators at the Port of Catoosa. He testified essentially to the same series of events as did Officer Hamby.

Dr. Robert Fogle testified he was a pathologist at the Oklahoma Osteopathic Hospital and that he performed an autopsy on the decedent on February 15, 1974. In his opinion the death of the decedent was the result of stab wounds to the neck which had been caused by a bladed instrument or knife. An examination of the decedent's body revealed some 15 wounds, five of which were stab wounds. On being shown State's Exhibits numbered 18, 19 and 20, he testified that said exhibits were photographs of the decedent's body at the morgue on February 15, which represented various wounds to the body. Thereafter, said exhibits were admitted into evidence.

Donald Meeker testified he was the husband of the decedent and that identification of his wife was made on February 15, by Deputy

Benny Dirck.

The defendant's first assignment of error asserts that the trial court erred in failing to grant the defendant a motion for change of venue which was premised on alleged adverse pretrial publicity, specifically several articles published in various county newspapers. In Shapard v. State, Okl.Cr., 437 P.2d 565 (1967), this Court adopted the language used in United States v. Hoffa, 156 F.Supp. 495 (S.D. N.Y. 1957) as follows:

> "'Mere fact that there has been widespread adverse pretrial publicity about defendant does not, by itself, establish reasonable probability that defendant cannot obtain a fair and impartial jury at criminal trial and is therefore entitled to postponement of trial for indefinite or substantial period of time.
>
> "'Mere fact that prospective jurors have read newspaper or other publicity items critical of defendant does not, by itself, establish bias, pre-judgment, or other disqualification on part of prospective jurors, and does not entitle defendant to postoponement of trial for indefinite or substantial period of time.
>
> "'Where there has been widespread adverse pretrial publicity about defendant, proper procedure in vast majority of cases is not to postpone trial indefinitely or for substantial period of time, but to proceed to trial and to determine on voir dire of panel and individual talesmen whether fair and impartial jury can be selected.'" (at page 578)

We could have summarily disposed of this assignment by reason of the failure of the defendant to challenge any of the jurors for cause and preserve the record by taking exception to the ruling of the court denying said challenge; however, we need not rest our opinion on this procedural technicality. Title 22 O.S. 1971, § 662, provides in pertinent part:

> "In a challenge for implied bias, one or more of the causes stated in the second preceding section must be alleged. In a challenge for actual bias, the cause stated in the second subdivision of the third preceding section must be alleged; but no person shall be disqualified as a juror by reason of having formed or expressed an opinion upon the matter or cause to be submitted to such jury founded upon rumor, statements in public journals, or common notoriety, provided it appears to the court, upon his declaration, under oath or otherwise, that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him. The challenge may be oral, but must be entered upon the minutes of the court." (Footnotes omitted)

In Shapard v. State, supra, this Court compared the language of this statute to the language of the United States Supreme Court in Irvin v.

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Dowd, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751, and adopted such language as a test to be utilized in such cases. The language, in pertinent part, states:

> "'It is not required, however, that the jurors be totally ignorant of the facts and issues involved. In these days of swift, widespread and diverse methods of communication, an important case can be expected to arouse the interest of the public in the vininity, and scarcely any of those best qualified to serve as jurors will not have formed some impression or opinion as to the merits of the case. This is particularly true in criminal cases. To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.' (Emphasis ours)" (at page 591)

As in Shapard v. State, supra, in the instant case: (a) none of the jurors impanelled were challenged for cause by the defendant; (b) all of the jurors unequivocally stated that they would base their verdict on the evidence presented and lay aside any impression or opinion which they might have formed as a result of what they had read or heard discussed;[1] and, (c) the defendant was represented by two capable attorneys who were allowed extensively to examine the jurors called.

We are therefore of the opinion that the record supports that a fair and impartial jury was impanelled and the trial court did not err in overruling the defendant's motion for change of venue. For the reasons stated, we find defendant's first assignment of error to be without merit.

The defendant's second, third and fourth assignments of error having commonality of subject will be considered together. These assignments are premised on the defendant's assertion that the admission

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[1] Such representations by the jurors ultimately impanelled are found in the record as follows: (1) Beatrice Huck (Tr. 28); (2) Hazel Riesinger (Tr. 239, 240 and 241); (3) Ethel Walker (Tr. 207, 211); (4) Patsy L. Hanes (Tr. 190, 191 and 192); (5) Ola Wright (Tr. 42); (6) Norman Schulze (Tr. 184 and 186); (7) Avery Bickell (Tr. 70, 71 and 106) (8) Fred Holland (Tr. 71-72 and Tr. 89-90); (9) Theresa Robinson (Tr. 1 160 and Tr. 162); (10) JoAnn Greggs (Tr. 224-225 and Tr. 226-227) (11) Isbel Hurd (Tr. 118); (12) Fern Vincent (Tr. 129-130).

into evidence of the testimony of Officer Hamby and Officer Johnson regarding the defendant's confession to the murder of the decedent, Beverly Ann Mecker, was impermissible as the defendant alleges that the warnings he received prior to this confession were not in compliance with the mandate of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In Miranda v. Arizona, supra, the United States Supreme Court stated:

> "[T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." . . . (384 U.S. at 444, 86 S.Ct. at 1612, Emphasis added, footnote omitted)

The record of the instant case reflects that the trial court properly conducted an admissibility hearing on the defendant's confession to the officers. The trial court overruled the defendant's motion to suppress the confession finding that the defendant, prior to such confession, was properly advised of his rights in accordance with Miranda v. Arizona, supra. The defendant contends the rights waiver utilized by the police in the instant case is defective within the meaning of Miranda, supra, as the warning failed to advise the defendant of his right to appointed counsel prior to interrogation.

On the basis of the record before us, we feel it not necessary to reach the constitutional adequacy of the rights waiver used in the instant case to dispose of these assignments. In the Miranda case itself, the Supreme Court stated:

> "In dealing with statements obtained through interrogation, we do not purport to find all confessions inadmissible. Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected

by our holding today." (384 U.S. at 478, 86 S.Ct. at 1630, footnote omitted)

The testimony of Officers Johnson and Hamby reflects that the defendant was arrested at 12:40 p.m. on the 16th of February, 1974. The defendant was transported to the police station and, after changing into clothing furnished by deputies, the officers testified that the defendant was advised of evidence which would place him and his automobile in the vicinity of the scene where the body of the victim, Beverly Meeker, had been found, and at that time the defendant acknowledged he had been there, his automobile had been there, but at that time he said that before he talked to the officers further he wished to converse with his father and his wife. The officers testified that all questioning was stopped and the defendant's wife and father were summoned and arrived at 5:00 p.m. After the defendant visited with his father and his wife for 30 minutes, the defendant called Officer Johnson back into the office and stated he was willing to talk with him at that time and that he had taken the life of the victim, Beverly Ann Meeker.[2] Officer Hamby testified the defendant prefaced his statement to the officers by saying, "his wife told him that she had a right to know, she asked him if he did it."

Under the version of the facts binding upon us, we find the defendant's confession was wholly volunteered and not at all the product of police pressure, the pressure which Miranda condemned as threatening the Fifth Amendment privilege against self-incrimination. We further find that there was no "questioning initiated by law enforcement officers" within the scope of the Miranda decision. To confess was not the product

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[2] These facts are reflected in the record as follows:

"A. I advised Mr. Rowbotham as part of our evidence we could establish that he and his automobile had been in the scene, approximately the vinicity (sic) of the scene where the body of the victim, Mrs. Meeker had been found on the morning of the 15th, near the highway 33 Verdigris River Channel intersection. Mr. Rowbotham at that time acknowledged that he had been there, his automobile had been there, but at that time requested before he talked to us any further that he be allowed to converse with his father and with his wife.

"Q. Was he allowed to do this sir?

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of an interrogation, either direct or subtle, but was more in the nature of volunteered information and not violative of the Fifth Amendment, United States Constitution, nor Article 2, § 20, of the Oklahoma State Constitution. See, Johnson v. State, Okl.Cr., 448 P.2d 266 (1969).

Assuming arguendo that the defendant's confession in the instant case does fall within the Miranda Rule, we find the rights waiver signed by the defendant comports with all the directives of Miranda. The waiver of which the defendant was orally advised and which he also signed reads as follows:

> "Before we ask you any questions, you must understand your rights. You have the right to remain silent. Anything you say can be used against you in court. You have the right to talk to a lawyer for advice before we ask you any questions, and to have him with you during questioning. You have this same right to the advice and presence of a lawyer, even if you cannot afford to hire one. We cannot ourselves furnish you a lawyer, but one will be appointed for you, if you wish, when you go to court. If you wish to answer questions now without a lawyer present, you have the right to stop answering questions at any time. You also have the right to stop answering at any time until you talk to a lawyer.
>
> "WAIVER
>
> "I have read the statement of my rights shown above. I understand what my rights are. I am willing to answer questions and make a statement. I do not want a lawyer at this time. I understand and know what I am doing. No promises or threats have been made to me and no pressure of any kind has been used against me." (State's Exhibit No. 8)

> "A. All questioning was stopped at that time, and his wife and his father was summoned.
>
> "Q. And after he had an occasion to visit with his father and his wife, did you have further conversation with him?
>
> "A. I did, sir.
>
> "Q. What did that conversation consist of?
>
> "A. Mr. Rowbotham called me back in the office after he had conversed with his wife, and stated that he was willing to talk with us at that time, that he had taken the life of the victim, Beverly Meeker, I then asked him why he did it, and his reply was; that he guessed the devil made him do it. At that time a short conversation took place between us, at which time I asked the defendant if he would be willing to return to the scene where the crime was committed, and relate to us exactly what had occurred. Mr. Rowbotham consented to do so and we then left the courthouse." (Tr. 153-154)

The defendant asserts that the warning was an inadequate statement of the rights of one in custody as set forth in Miranda, which dictates specific advice that one has the right to the presence of a lawyer, not at some later time, but then and there; and thus because of such infirmity his waiver of his constitutional right to remain silent and to be given counsel at his interrogation was invalid as a matter of law.

We note the form of the warning used in the instant case has come under judicial review in numerous jurisdictions and there has been a diversity of decision on its adequacy. In Wright v. State of North Carolina, 483 F.2d 405 (4th Cir. 1973), citing with approval United States v. Lacy, 446 F.2d 511 (5th Cir. 1971), that court stated:

> "'We think this warning comports with the requirements of Miranda. Lacy was informed that he had the right to the presence of an appointed attorney before any questioning. The agents did say that the appointment of an attorney would have to be made by the court at a later date. But they also made perfectly clear that Lacy had a right not to answer questions until that time should come. Thus we think the twin requirements of Lathers v. United States, 5 Cir. 1968, 396 F.2d 524 were met: the defendant was informed that (a) he had the right to the presence of an attorney and (b) that the right was to have an attorney "before he uttered a syllable". That the attorney was not to be appointed until later seems immaterial since Lacy was informed that he had the right to put off answering any questions until the time when he did have an appointed attorney.'
>
> "A like conclusion was earlier expressed by the same Court in Mayzak v. United States (5th Cir. 1968), 402 F.2d 152. There, the warning was substantially the same as that given here. The defendant was advised of his right to counsel but was told that he could not be furnished counsel 'until federal charges had been brought against him.' As here, the defendant contended such warning did not meet the strict standards of Miranda. In overruling the contention, the Court said (at 155):
>
> "'Stripped of its cry of pain, defendant's contention is simply that he was entitled to be warned not only of his right to counsel, but of his right to instant counsel. Miranda, however, does not require that attorneys be producible on call, or that a Miranda warning include a time table for an attorney's arrival. Nor does it seem to us requisite that the officer conducting the interview declare his personal and immediate power to summon an attorney. The adequacy of the warning is not jeopardized by the absence of such embellishments.'
>
> "The Second Circuit in Massimo v. United States (2nd Cir. 1972), 463 F.2d 1171, 1174, cert. denied, 409 U.S. 117, 93 S.Ct. 920, 34 L.Ed.2d 700, where a warning similar to that in this case was at issue, adopted the view stated in Lacy on the adequacy of the warning. Specifically, it rejected the conclusions on the point as reached ir United States v. Cassell (7th Cir. 1971),

452 F.3d 533 and in United States v. Garcia (9th Cir. 1970), 431 F.2d 134, two of the authorities relied on heavily by the petitioner. We choose to follow the reasoning applied in Lacy and Massimo and to sustain the sufficiency of the warning." (at page 406-407)

An analogous situation was discussed in Coyote v. United States, 380 F.2d 305 (10th Cir. 1967), wherein Judge Murrah stated:

> "Surely Miranda is not a ritual of words to be recited by rote according to didactic niceties. What Miranda does require is meaningful advice to the unlettered and unlearned in language which he can comprehend and on which he can knowingly act. We will not indulge semantical debates between counsel over the particular words used to inform an individual of his rights. The crucial test is whether the words in the context used, considering the age, background and intelligence of the individual being interrogated, impart a clear, understandable warning of all of his rights.
>
> "It is, of course, always open to an accused to subjectively deny that he understood the precautionary warning and advice with respect to the assistance of counsel. When the issue is raised in an admissibility hearing, i.e. see McHenry v. United States, 10 Cir., 308 F.2d 700, it is for the court to objectively determine whether in the circumstances of the case the words used were sufficient to convey the required warning." (at page 308)

The law among the circuits and state courts is contradictory on this question.[3]

Today we reverse our holding enunciated in Reese v. State, Okl.Cr., 462 P.2d 331 (1969) and Schorr v. State, Okl.Cr., 499 P.2d 450 (1972), insofar as they are inconsistent with this opinion, and adopt the reasoning in Wright v. North Carolina, supra, thus finding that the rights waiver in the instant case satisfied the mandate of Miranda. For the reasons herein stated, we reject the defendant's second, third and fourth assignments of error.

The defendant's fifth assignment of error asserts that the prosecutor, in closing argument, commented upon thy defendant's failure to testify, thus constituting reversible error in light of 22 O.S. 1971, § 701.[4] The prosecutor's comment of which the defendant now complains

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[3] This was recently alluded to by Justice Douglas. The Supreme Court, with Justice Douglas dissenting, recently declined to accept review of a case presenting this question. Wright v. North Carolina, cert. denied, 94 S.Ct. 1452 (1974) (Douglas, J., dissented with opinion from denial.)

[4] Title 22 O.S. 1971, § 701, reads as follows:

is found in the record as follows:

> ". . . And Ladies and Gentlemen, bear this in mind. The evidence presented by the State has gone uncontradicted. That is the evidence for you to consider. I don't know that these are Roger's clothes. I don't know that. I don't know that this is the clothes of Mrs. Meeker. I don't know if that is blood on that slip or not. . . .
>
> "MR. DOUTHITT: Object to the statements, your honor, may we approach the bench.
>
> "COURT: Yes sir.
>
> "MR. DOUTHITT: At this time the defendant objects to the remarks of the State to the effect that the evidence of the State has gone uncontradicted. This is a clear indication to the jury that the defendant has failed to testify and his failure to testify is grounds for mis-trial and we move for mis-trial at this time.
>
> "COURT: Overruled, sir." (Tr. 213)

The defendant asserts that the statement of the prosecutor was equivalent to saying the defendant had failed to take the stand to testify in his own behalf. We cannot agree with this contention as "fairly interpreted, it was an assertion that there had been no evidence controverting that presented by the State. It was in effect a comment on the fact that testimony witnesses for the State had not been contradicted." See, Chesser v. State, 63 Okl.Cr. 84, 73 P.2d 191 (1937). The Court in Chesser went on to say, citing McDonald v. State, 59 Okl. Cr. 318, 58 P.2d 345, as follows:

> "'The statute, section 3068, supra, is comprehensive in the extreme and this court will not enlarge nor extend its provisions so as to prevent a fair discussion of the evidence, even though the defendant did not testify and called no witnesses in his behalf. This statute will not be deemed to go to the extent of prohibiting comment upon inferences reasonably to be drawn from a failure to controvert the state's evidence by proof other than that which might be given by the defendant personally. Murrell v. State, 34 Okl.Cr. 413, 246 P. 644; McDaniel v. State, 35 Okl.Cr. 425, 250 P.804; Soper v. State, 22 Okl.Cr. 27, 208 P. 1044.

> "In the trial of all indictments, informations, complaints and other proceedings against persons charged with the commission of a crime, offense or misdemeanor before any court or committing magistrate in this State, the person charged shall at his own request, but not otherwise, be a competent witness, and his failure to make such request shall not create any presumption against him nor be mentioned on the trial; if commented upon by counsel it shall be ground for a new trial."

"'It is our opinion that the county attorney did not exceed his privilege.'" (at page 197)

We further note this Court's holding in Morrow v. State, Okl.Cr., 508 P.2d 714 (1973), citing with approval Spears v. State, 97 Okl.Cr. 249, 261 P.2d 464, wherein in the fourth paragraph of the Syllabus this Court held:

"'Where a defendant fails to offer any evidence, the prosecutor is not prevented from discussing the evidence against him and to state that such evidence is uncontradicted. Such argument would not be a violation of the statute forbidding comment on the fact the defendant did not testify.'" (at page 717)

For the reasons herein stated we reject the defendant's fifth assignment of error.

In defendant's sixth assignment of error, he asserts that the trial court erred in overruling the defendant's objection to certain alleged prejudicial remarks made by the prosecution. The remark of which the defendant now complains is found in the record as follows:

". . . Mr. Harby and Mr. Johnson will relate to you ladies and gentlemen that on two different occasions they advised this defendant of his constitutional rights, what is known as the Miranda rights, warning, they will relate those rights they advised this defendant of, and after being fully advised of his rights, the defendant related to them, his actions on the 15th of February 1974, early morning hours, how he stabbed Beverly Meeker to death. And he will also ladies and gentlemen relate to you what the defendant told him what his reason and purpose for stabbing Mrs. Meeker to death. They will also relate to you ladies and gentlemen during the time that the defendant was making his confession to them, they inquired about the knife that was used in the fatal stabbing. That he agreed to take them back to the scene, show where he had thrown the knife. . . . They will identify the knife they recovered as a result of where the defendant said he had thrown the knife after he had fatally stabbed Beverly Meeker. . . ." (Tr. 8-9, Vol. II)

The defense, citing Wright v. State, Okl.Cr., 325 P.2d 1089 (1958), submits that the test to be utilized in evidentiary harpoon cases is whether the defendant's right to a fair and impartial trial was materially prejudiced thereby or whether the harpoon complained of amounted to harmless error. He also cites Davis v. State, Okl.Cr., 489 P.2d 789 (1971); Robinso v. State, Okl.Cr., 507 P.2d 1296 (1973); and, Belk v. State, Okl.Cr., 520 P.2d 373 (1974). The defense goes on to say that such assignment of erro is premised on anticipation that this Court would sustain the defendant's second, third and fourth assignments of error relating to the admissibili of the defendant's confession. In light of this Court's previous disposi

tion of the defendant's second, third and fourth assignments of error, we find the sixth assignment of error to be without merit.

The defendant's seventh and eighth assignments of error, having commonality in subject, will be discussed together. The defendant asserts the trial court erred in admitting various State's Exhibits as said exhibits were irrelevant, immaterial, of no probative value and thus served no purpose other than to inflame and prejudice the jury.

The defendant first complains of the admission into evidence of State's Exhibit No. 1, a knife. Defendant next complains of the admission into evidence of various items of defendant's clothing, and lastly defendant complains of admission into evidence of the various photographs of the victim.[5]

In Abel v. State, Okl.Cr., 507 P.2d 569 (1973), this Court noted:

> "The second proposition contends that the court erred in admitting the photographs of the deceased into evidence. The defendant argues that the photographs were inflammatory and prejudicial and that no proper foundation was laid for their admission into evidence. We are of the opinion that the photographs were properly admitted. In Pate v. State, Okl.Cr., 361 P.2d 1086, we stated in the eighth and ninth paragraphs of the Syllabus:
>
> "'When a photograph is shown to be a faithful repoduction of whatever it purports to reproduce, it is admissible in evidence, as an appropriate aid to the jury in applying the evidence and this is equally true whether it relates to persons, things, or places.
>
> "'Although it is error to receive in evidence gruesome photographs of a homicide victim, designed primarily to arrouse (sic) the passion of the jury, such photographs are admissibl ; when they are relevant to the issues before the court and their probative value is not outweighed by the danger of prejudice to the defendant.'
>
> "The photographs in question were identified by several witnesses as being true and correct pictorial representations of the body of Jacqueline Abel as they observed her at the hospital. The pictures were not taken after extensive surgery and were not gruesome. The photographs clearly depict the various bruises upon the child's body and their probative value is not outweighed by the danger of prejudice to the defendant." (at page 572)

After carefully considering all of the State's Exhibits admitted

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[5]The defendant's clothing was marked as State's Exhibit Nos. 10 through 13, and the photographs of the victim were numbered 5, 6, 7, 18, 19 and 20.

into evidence, we feel that the probative value of said exhibits is not outweighed by the danger of prejudice to the defendant. For this reason we find the defendant's seventh and eighth assignments to be without merit.

Having commonality in subject, the defendant's ninth, tenth and eleventh assignments of error will be considered together. Said assignments essentially assert that the record is void of any evidence sufficient to prove the defendant attempted to rape the victim and as such the defendant could not be guilty of murder in the first degree as set forth in 21 O.S. Supp. 1974, § 701.1, ¶2.[6] The defendant thus contends that he was entitled to an instruction to the jury on second degree murder. The record reflects that the defendant requested an instruction to the jury and said request was refused by the trial court.

In the opinion of Williams and Justus v. State, Okl.Cr., ___ P.2d ____, F-74-648 and F-74-650 (1975), this Court recently observed:

> "This Court indicated that 21 O.S.Supp. 1974, § 701.3, should be strictly construed to permit lesser included instructions only where clearly appropriate in Murray v. State, Okl.Cr., 528 P.2d 739 (1974), wherein we held that an instruction upon Second Degree Murder was improper in a First Degree Murder prosecution allegedly perpetrated pursuant to an armed robbery. . . ."

In Kidd v. State, Okl.Cr., 462 P.2d 281 (1969), the elements required to constitute an attempted crime were set forth as follows: (1) intent, (2) some overt act toward the commission of the crime, and (3) failure to consummate. In the instant case the defendant's own words to the officers were:

> ". . . he stated his intentions were to have sexual intercourse with her.
>
> * * *
>
> ". . . At that time he stated that the victim started removing her clothing and that during the removal of her clothing a struggle developed between he and she, at which time he stabbed the victim with the pocket knife

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[6] Title 21 O.S. Supp. 1974, § 701.1 in pertinent part reads:

"When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;"

he had. . . ." (Tr. 155-156)

We feel this evidence clearly shows the defendant attempted to rape the decedent after which a struggle ensued and the defendant stabbed the decedent. Thus, we find the evidence only supports an instruction on first degree murder and the trial court properly refused the defendant's request to instruct the jury on second degree murder. For the reasons herein stated, we find the defendant's ninth, tenth, and eleventh assignments of error to be without merit.

The defendant's twelfth assignment of error asserts the death sentence could not be imposed because the jury was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction, in violation of Witherspoon v. Illinois, 391 U.S. 510, 522, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). This contention is principally based on the exclusion of Mrs. Helt in that she was excused because she expressed doubt as to whether or not she could assess the death penalty.[7] In the recent opinion of Justus v. State, Okl.Cr., ___ P.2d ____, F-74-713 (1975), this Court noted:

> "We are of the opinion that a challenge for cause is appropriate to the extent that the venireman is equivocal and uncertain regarding his capacity to follow the law and honor the oath of a juror. . . . Clearly, no prospective juror with animosity concerning the death penalty should be excused upon this basis if able to set aside personal beliefs or attitudes and fulfill the oath to try the case impartially according to the law and the evidence. However, if satisfied of the defendant's guilt beyond a reasonable doubt, a venireman is unresolved as to whether he could then assess the death penalty, or knowing the death penalty

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[7] "MR. HOPPER: Thank you your Honor. Mrs. Helt, have you ever served on a jury before.

"MRS. HELT: No.

"MR. HOPPER: How long have you lived in Rogers County.

"MRS. HELT: Practically all my life.

"MR. HOPPER: Do you have a family maam.

"MRS. HELT: Yes.

"MR. HOPPER: What does it consist of.

to be mandatory upon conviction, he is uncertain whether he could stand indifferent between the defendant and the State in deliberating his verdict according to the law and the evidence, then he has to that extent forewarned the court that he is undecided whether he could comply with the oath of a juror. A challenge for cause should be granted against such a venireman, for otherwise the administration of the oath would be frivolous. We agree with the cogent argument of the State that the trial court should not accept a juror who does not know whether he can follow the law, and that to do otherwise would create chaos and make our system of jurisprudence a mockery based upon the personal whims of individuals. The State, as well as the defendant, is entitled to a fair and impartial jury. . . ." (Citations omitted)

The examination of Mrs. Helt unquestionably reveals that she had personal reservations concerning the death penalty, and that she vacillated regarding her capacity to set those reservations aside and otherwise be a fair and impartial juror and, thus, we feel she was properly excused.

For the reasons herein stated, we find the defendant's twelfth assignment of error to be without merit.

The defendant's final assignment of error asserts the death sentence is unconstitutional by virtue of the decision of the United States Supreme Court in the consolidated cases of Furman v. Georgia, Jackson

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"MRS. HELT: Two boys.

"MRS. (sic) HOPPER: Mrs. Helt, do you have any quarrel with the law that makes it a capital offense for a person to take the life of another person without justifiable cause or without authority of law.

"MRS. HELT: No.

"MR. HOPPER: Do you believe in capital punishment.

"MRS. HELT: Yes.

"MR. HOPPER: If the State should meet its burden in this case and prove to you and eleven other jurors that the defendant did in fact commit the crime of first degree murder, could you return a verdict of guilty knowing what the punishment would be.

"MRS. HELT: I just don't know.

"MR. HOPPER: It is a tough question, isn't it.

"MRS. HELT: Yes it is.

"MR. HOPPER: Do you have some doubt in your mind, as to whether you could assess the death penalty.

"MRS. HELT: Yes.

"MR. HOPPER: We would ask that this juror be excused." (Tr. 194-196)

v. Georgia, and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 32 L.Ed. 2d 346 (1972). However, in this regard we need only observe that this contention was fairly analyzed and rejected by this Court in the consolidated opinion of Williams and Justus v. State, supra.

Pursuant to Rule 1.11 of this Court, 22 O.S.Supp. 1974, Ch. 18, App., this case was previously assigned and heard for oral argument. We have now carefully reviewed the entire record before this Court and have thoroughly considered the argument and authority presented. Pursuant to the provisions of 21 O.S.Supp. 1974, § 701.5, we have determined that the record is free of any error of law requiring reversal or modification. The judgment and sentence is, accordingly, AFFIRMED.

We also observe this Court's recent decision in Williams and Justus v. State, supra, holding that the evidentiary hearing contemplated under the provisions of 21 O.S.Supp. 1974, §§ 701.5 and 701.6, is unnecessary. We further note pursuant to Rule 1.18, 22 O.S.Supp. 1974, Ch. 18, App., the defendant is advised that any Petition for Rehearing herein must be filed with the Clerk of this Court within fifteen (15) days of the date upon which this opinion is filed therein.

AN APPEAL FROM THE DISTRICT COURT, ROGERS COUNTY, OKLAHOMA,
HONORABLE JOHN Q. ADAMS, JUDGE,

ROGER DALLAS ROWBOTHAM, appellant, was convicted of the offense of Murder, First Degree; was sentenced to death, and appeals. Judgment and sentence AFFIRMED.

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OPINION BY BLISS, J.
BRETT, P. J., CONCURS IN PART AND DISSENTS IN PART
BUSSEY, J., CONCURS

BRETT, P.J. (Concurring in Part and Dissenting in Part):

Although I concur in the affirmance of Rowbotham's conviction, I must dissent from that portion of the majority's opinion which overrules the cases of Reese v. State, Okl.Cr., 462 P.2d 331 (1969), and Schorr v. State, Okl.Cr., 499 P.2d 450 (1972), and declares adequate the Miranda warning contained in the printed waiver of rights form which Rowbotham signed.

I believe the majority opinion correctly concludes that Rowbotham's confession was admissible regardless of any defect in the Miranda warning which he had been given for the reason that it was a volunteered statement. The record supports that Rowbotham voluntarily initiated the giving of that statement and that it was not a product of questioning nor the result of coercive circumstances. Such statements are, as the majority points out, sanctioned by this Court and expressly authorized by the Miranda opinion. For that reason, I agree that Rowbotham's confession was properly admitted into evidence against him.

I cannot, however, agree with that portion of today's decision which overrules Reese v. State, supra, and Schorr v. State, supra, and which holds that the Miranda warning contained in the printed form signed by Rowbotham was adequate to meet the standards set by Miranda. I continue to believe that the addition to the Miranda warnings of the statement,

> "We cannot ourselves furnish you a lawyer, but one one will be appointed for you, if you wish, when you go to court."

is impermissible and would under certain circumstances constitute a fatal defect.

In this matter I find myself more persuaded by the reasoning of United States ex rel Williams v. Twomey, 467 F.2d 1248 (7th Cir. 1972), than by that of Wright v. North Carolina, 483 F.2d 405 (4th Cir. 1973), relied upon by the majority. Speaking of a like addition to a Miranda warning, the opinion in United States ex rel Williams v. Twomey, supra, states:

> "We hold that the warning given here was not an 'effective and express explanation;' [Miranda 384 US 436 at 473] To the contrary, it was equivocal and ambiguous. In one breath appellant was informed that he had the right to appointed counsel during questioning. In the next breath, he was told that counsel could not be provided until later. In other words, the statement that no lawyer can be provided at the moment and can only be obtained if and when the accused reaches court substantially restricts the absolute right to counsel previously stated; it conveys the contradictory alternative message that an indigent is first entitled to counsel upon an appearance in court at some unknown future time. The entire warning is therefore, at best, misleading and confusing and, at worst, constitutes a subtle temptation to the unsophisticated indigent accused to forego the right to counsel at this critical moment." 467 F.2d at 1250.

The point is that the warning under discussion here makes clear that the accused has the right to have a lawyer prior to questioning, and that if he cannot afford one, one will be appointed for him when he goes to court; but it fails to make absolutely clear that the accused is entitled to an appointed lawyer prior to questioning. I believe the ambiguity thus imported into the warning causes it to fall short of the standard of clarity required by the Miranda decision.

APPENDIX B

REASONS FOR GRANTING THE WRIT

I.

INTRODUCTION

In 1972, this Court held that the penalty of death could not be inflicted under a statutory scheme which permitted its arbitrary, rare and discriminatory use. Furman v. Georgia, 408 U.S. 238 (1972). Oklahoma's extant capital punishment statutes were thereby invalidated. Koonce v. Oklahoma, 408 U.S. 934 (1972); Fesmire v. Oklahoma, 408 U.S. 935 (1972); Menthen v. Oklahoma, 408 U.S. 940 (1972).[3]

Effective May 17, 1973, the Oklahoma legislature devised new measures for the imposition of the death penalty for the newly defined crime of first degree murder.[4] 21 Okla. Stat. Ann. §§701.1, 701.3, 701.5 and 701.6 (1975-76 Supp.). Under the 1973 enactment, homicides committed "without authority of law" and with "premeditated design" to effect death are murder in the first degree if committed under any of ten circumstances:

> "1. When perpetrated against any peace officer, prosecuting attorney, corrections employee or fireman while engaged in the performance of his official duties;
>
> "2. When perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of sixteen (16) years;
>
> "3. When perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial

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3/ See also Pate v. State, 507 P.2d 915, 916 (Okla. Cr. App. 1973): "After an exhaustive study of the opinions rendered by the Supreme Court of the United States, this court reluctantly finds that it is impermissible, under said decisions, to impose a sentence of death on any convicted person until such time as the laws have been duly enacted conforming to the standards set forth in Furman v. Georgia."

4/ Prior to Furman, kidnapping for ransom, armed robbery and rape were also punishable in Oklahoma by death. 21 Okla. Stat. Ann. §745 (1958); 21 Okla. Stat. Ann. §801 (1958); 21 Okla. Stat. Ann. §1115 (1975-76 Supp.).

or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill such witness;

"4. When perpetrated against the President or Vice President of the United States of America, any official in the line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America;

"5. When perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers;

"6. When perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing;

"7. Murder by a person under a sentence of life imprisonment in the penitentiary;

"8. When perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location;

"9. When perpetrated against a child while in violation of Section 843, Title 21 of the Oklahoma Statutes; and

"10. Intentional murder by the unlawful and malicious use of a bomb or of any similar explosive."

21 Okla. Stat. Ann. §701.1 (1975-76 Supp.)

If a first degree murder case is tried to a jury, the jury "shall determine only whether the defendant is guilty or not guilty . . . and upon a finding of guilty shall so indicate on their verdict and state affirmatively in their verdict that the defendant shall suffer death."[5] In the event of a first degree murder conviction after a bench trial or upon a guilty plea, "the court shall enter a judgment and sentence of death."[6] The statute authorizes capital juries to be instructed "regarding

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5/ 21 Okla. Stat. Ann. §701.3 (1975-76 Supp.)

6/ Ibid.

lesser and included offenses and lesser degrees of homicide if the evidence warrants such instructions" and if "the judge . . . states into the record his reasons for giving the instruction based upon the evidence adduced at trial."[7] Although §701.3 states that "[e]very person convicted of murder in the first degree shall suffer death,"[8] §701.5 requires the Court of Criminal Appeals to conduct "an evidentiary hearing" in all death cases for the purpose of determining inter alia "whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Such "substantially disproportionate" death sentences must be modified to sentences of "life in the penitentiary at hard labor."[9]

7/ Ibid.

8/ Ibid.

9/ 21 Okla. Stat. Ann. §701.6. (1975-76 Supp.). Oklahoma has long permitted appellate review of criminal sentences in an unusual form. See Note, Criminal Procedure - Scope of Appellate Review of Sentences in Capital Cases, 108 U.PA.L.REV. 434, 436 (1960). Under 22 Okla. Stat. Ann. §1066 (1958), the Court of Criminal Appeals possesses power to " . . . modify the judgment appealed from." This power has been held to permit the modification of sentences, Dickman v. State, 336 P.2d 1113 (Okla. Cr. App. 1959), and has been used to reduce death sentences "in furtherance of justice," Murphy v. State, ____ Okla. Cr. ____, 112 P.2d 438, 457 (1941), on the basis of factors deemed mitigating by the appellate court, ibid.; Mitchell v. State, ____ Okla. Cr. ____, 60 P.2d 631 (1936); Methvin v. State, ____ Okla. 60 P.2d 1062 (1936); Peters v. State, ____ Okla. Cr. ____, 211 P.427 (1922), on the basis of factors thought to have prejudiced the judge or jury, Young v. State, ____ Okla. Cr. ____, 200 P.260 (1921); Mays v. State, ____ Okla. Cr. ____, 197 P.1064 (1921), on the basis of error deemed insufficiently substantial to warrant a new trial, Gibson v. State, 501 P.2d 891 (Okla. Cr. App. 1972); Sango v. State, ____ Okla. Cr. ____, 5 P.2d 400 (1931); Doublehead v. State, ____ Okla. Cr. ____, 228 P.170 (1924), or for no apparent or stated reason, Noble v. State, ____ Okla. Cr. ____, 6 P.2d 840 (1932); Jewell v. State, ____ Okla. Cr. ____, 273 P.366 (1929).

This was the law of Oklahoma as it stood at the time of the crime with which petitioner Michael Wayne Green was charged below, and at the time of petitioner's trial. It was changed, however, following petitioner's conviction and the imposition of a death sentence upon him by the trial court. In Williams v. State, 542 P.2d 554 (Okla. Cr. App. 1975), the Oklahoma Court of Criminal Appeals considered the federal constitutionality of the 1973 capital punishment statute. The court initially sustained the provisions of 21 Okla. Stat. Ann. §§701.1 and 701.3 (1975-1976 Supp.) (see pp. 2 - 41, 10 - 12 supra), governing capital sentencing at the trial level, 542 P.2d at 583-584, and it accordingly set the Williams appeal for the "evidentiary hearing" and sentence review prescribed by §701.5 (see pp. 4, 12 supra). But upon further reflection, it held that §§701.5 and 701.6 were unconstitutional insofar as those sections authorized appellate reconsideration and reduction of death sentences that were "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" (see pp. 4, 12 supra); it vacated its order for an "evidentiary hearing" of Williams' appeal; and it affirmed Williams' death sentence as imposed by the trial court.

> "We are now of the opinion that 21 O.S. Supp. 1974, §§ 701.5 and 701.6, are unconstitutional. The provisions regarding the hearing contemplated therein are so vague, indefinite and uncertain that they are incapable of rational interpretation and implementation without additional legislation. Also, such a hearing is duplicitous to that procedure previously established for the presentation of evidence before the trial court upon any legal issue, including such issues as adherence to principles of due process and equal protection of the law, with this Court then fulfilling the role of appellate review rather than a court of first impression. We do not by our decision herein, however, in any manner preclude or limit the right of a defendant before this Court on appeal to present a Motion for New Trial based upon newly discovered evidence as otherwise provided for in 22 O.S. 1971, §953. See also, Rule 2.12, 22 O.S.Supp.1974, Ch. 18, App. Nothing in this opinion shall preclude the de-

> fendants from asserting violation of constitutionally guaranteed rights not dealt with in this opinion in a post conviction proceeding under the provisions of 22 O.S.1971, § 1080 et seq. Further, under the mandatory scheme of capital punishment adopted by the Legislature, we are of the opinion that the proper remedy, where otherwise appropriate, for deprivation of any accused's right to due process and equal protection of the law is reversal for a new trial rather modification to life imprisonment. The exercise of such modification powers by this Court for an offense for which the legislature has otherwise mandated capital punishment would be violative of Furman. The power of this Court to modify a sentence imposed by the jury or the trial court must be within the limits of the statutory provisions governing the particular crime charged. See, Brown v. State, Okl. Cr. 314 P.2d 362 (1957). Since the Legislature has now provided but one sentence for the offense of First Degree Murder, the appropriate inquiry is whether a conviction for First Degree Murder is consistent with the law and not whether a sentence of death is substantially disproportionate to the penalty imposed in similar cases."

Id. at 583 - 84. The upshot was to leave Williams -- together with petitioner Green and others similarly situated[10/] -- subject to the penalties of death decreed upon them at the trial level without the opportunity for an evidentiary hearing and possible modification of their death sentences that had been provided by the Oklahoma statute in effect at the time of their respective offenses.

In State ex rel. Young v. Warren, 536 P.2d 965, 971 (Okla. Cr. App. 1975), the court further declared that:

10/ The Oklahoma Court of Criminal Appeals has thus far affirmed the death sentences of at least six similarly situated defendants. Davis v. State, 542 P.2d 532 (Okla. Cr. App. 1975); Williams v. State, 452 P.2d 554 (Okla. Cr. App. 1975); Justus v. State, 452 P.2d 598 (Okla. Cr. App. 1975); Lusty v. State, 452 P.2d (Okla. Cr. App. 1975); Rowbotham v. State, 452 P.2d 610 (Okla. Cr. App. 1975); Jones v. State, 452 P.2d 1316 (Okla. Cr. App. 1975).

"[s]ince the trial court is required, before giving . . . an instruction on a lesser offense, at a trial for Murder in the First Degree, to cause the record to reflect the evidence upon which he bases his instruction for the lesser offense, it necessarily follows that he may not constitutionally allow plea bargaining between the State and the defendant, or defendants, unless the following conditions are met:

"In all capital cases where a preliminary examination has been conducted on the charge of Murder in the First Degree, as in the instant case, and the testimony taken at said preliminary examination is sufficient to hold the defendant, or defendants, for trial, and the defendant, or defendants, thereafter enters a plea of not guilty at arraignment, the trial court, before permitting a reduction of the charge from Murder in the First Degree to any lesser offense, MUST require the State by competent evidence to establish that sufficient evidence exists to establish that the defendant, or defendants, was guilty of the lesser included offense, and not Murder in the First Degree. We reiterate that to do otherwise would violate the clear intent of 21 O.S. Supp. 1974, §701.3, and render unconstitutional the provisions of 21 O.S. Supp. 1974, §701.1, under the decisions of the United States Supreme Court in Furman v. Georgia, Jackson v. Georgia, and Branch v. Texas, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346."

See pp. 25 - 28 infra. Similar restrictions were placed upon jury instructions regarding lesser offenses and upon prosecutorial charging practices (or at least upon the practice of recharging by the filing of an amended information following dismissal of an initial charge) respectively in Murray v. State, 528 P.2d 739 (Okla. Cr. App. 1974), and Hanna v. State, 540 P.2d 1190 (Okla. Cr. App. 1975). See pp. 23 - 24 , 29 - 36 infra.

Petitioner's death sentence has been affirmed by the Court of Criminal Appeals in this context. The questions presented by his petition for certiorari, therefore, are:

(1) whether the retrospective invalidation of the appellate evidentiary-hearing and sentence-reduction provisions of Oklahoma's capital punishment statute violate the federal constitutional proscriptions against ex post facto laws and fundamental unfairness in criminal prosecutions (Part II infra);

(2) whether Oklahoma's procedures for the administration capital punishment continue -- notwithstanding the cosmetic surgery performed by the Oklahoma Court of Criminal Appeals -- to permit an arbitrarily selective

infliction of the death penalty that affronts Furman v. Georgia, 408 U.S. 238 (1972) (Part III (A) infra);

and

(3) whether the death sentence imposed upon petitioner is otherwise a cruel and unusual punishment forbidden by the Eighth and Fourteenth Amendments (Part III (B) infra).

II.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE POST FACTO INVALIDATION OF A STATUTORY PROVISION EMPOWERING AN APPELLATE COURT TO CONDUCT AN EVIDENTIARY HEARING AND THEREAFTER TO REDUCE THE DEATH PENALTY IMPOSED FOR THE CRIME OF FIRST DEGREE MURDER VIOLATES ARTICLE I, SECTION 10 OF THE CONSTITUTION OR THE FOURTEENTH AMENDMENT, WHERE THE EFFECT OF SUCH AN INVALIDATION IS TO SUBJECT A CRIMINAL DEFENDANT TO AN IRREDUCIBLE DEATH SENTENCE THAT WAS NOT AUTHORIZED BY LAW AT THE TIME OF HIS OFFENSE.

The Court of Criminal Appeals' affirmance of petitioner's death penalty after judicially modifying on appeal the 1973 Oklahoma death penalty statute presents a substantial question under the Ex Post Facto Clause for this Court's review. First, by invalidating 21 Okla. Stat. Ann. §701.6 (1975-76 Supp.) which authorized the Court of Criminal Appeals to impose a sentence of "life in the penitentiary at hard labor" in some capital cases, it transformed a procedure whereby some first degree murderers would be sentenced to death and some to life imprisonment to one where all such persons would be sentenced to death; Second, by invalidating 21 Okla. Stat. Ann. §701.5 (1975-76 Supp.), it deprived petitioner of an important procedural right: an "evidentiary hearing" before the Court of Criminal Appeals on the question whether, inter alia, his death sentence was imposed on the basis of "any . . . arbitrary fact" or was "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant".

Although the maximum sentence both before and after the Court of Criminal Appeals' September 17, 1975, decision remained the same, the range of punishments prescribed for first degree murder was made significantly harsher. In Lindsey v. Washington, 301 U.S. 397, 401 (1937), the Court declared:

> "the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer. It is for this reason that an increase in the possible penalty is ex post facto . . . regardless of the length of the sentence actually imposed."

It is clear from the factual context in Lindsey that the words "increase in the possible penalty" mean a "possible increase in penalty", for both the old law and the new law provided a maximum sentence of fifteen years for grand larceny. The new law, enacted after petitioners' crime was committed, simply deprived the sentencing court of the power to impose a minimum sentence.[11/] The Court held that a sentence of imprisonment "for not more than fifteen years" imposed under this new law violated the Ex Post Facto Clause (despite the fact that such a sentence could have been imposed under the old law) because the new sentencing scheme was "more onerous" than the previous one. The Court reached its conclusion by stating flatly that the result reached below by the Court of Criminal Appeals would constitute an Ex Post Facto violation:

11/ Under the old law governing grand larceny, the sentencing court was required to fix a minimum term of between six months and five years, with the prisoner to be eligible for parole at any time after the minimum time was served; the new law provided that "the court . . . shall fix the maximum term of . . . sentence only. The maximum term to be fixed by the court shall be the maximum provided by law for the crimes." Lindsey v. Washington, supra, 301 U.S. at 398.

> "It could hardly be thought that, if a punishment for murder of life imprisonment or death were changed to death alone, the latter penalty could be applied to homicide committed before the change." 12/

301 U.S. at 401 (emphasis added).

This case is squarely controlled by Lindsey. For the Court of Appeals' repeated insistence that Oklahoma had in 1973 enacted "an otherwise mandatory" scheme of capital punishment, Williams v. State, supra, 542 P.2d at 592, 594 recognizes that the legislature contemplated that some convicted first degree murderers would be ultimately sentenced to life imprisonment while others would receive the death sentence.

Affirmation of petitioner's death sentence after the 1973 Oklahoma death penalty was significantly altered is violative of the Ex Post Facto Clause for yet another reason. The Court's declaration in Kring v. Missouri, 107 U.S. 221, 235 (1883), that "[a]ny law passed after the commission of an offense which . . . '[i]n relation to that offense, or its consequences, alters the situation of a party to his disadvantage' is an ex post facto law," has been limited somewhat; and procedural changes which operate only "in a limited and unsubstantial manner to . . . [an accused's disadvantage" are not ex post facto. Beazell v. Ohio, 269 U.S. 167, 170 (1925). See Rooney v. North Dakota, 196 U.S. 319, 325 (1905); Malloy v. South Carolina, 237 U.S. 180, 183 (1915). However, a law which enacts a "harsh and arbitrary"

12/ "Removal of the possibility of a sentence of less than fifteen years . . . operates to . . .[petitioners'] detriment in the sense that the standard of punishment adopted by the new statute is more onerous than that of the old. . . . We need not inquire whether this is technically an increase in the punishment annexed to the crime . . . . It is plainly to the substantial disadvantage of petitioners to be deprived of all opportunity to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term."

Lindsey v. Washington, supra, 301 U.S. at 401-402.

procedural change, Beazell v. Ohio, supra, 269 U.S. at 170, or which takes from the accused a substantial right given to him by the law in force at the time of his crime "cannot be sustained simply because, in a general sense, it may be said to regulate procedure." Thompson v. Utah, 170 U.S. 343, 352 (1898). The Court of Criminal Appeals' ruling deprived petitioner of critically important procedural rights which are not "duplicitous" to existing procedures, Williams v. State, supra, 542 P.2d at 583. and which cannot be vindicated at a hearing on a motion for a new trial or at a post-conviction proceeding. For the Oklahoma Legislature explicitly chose to provide a hearing at which death sentences would be modified when "substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Okla. Stat. tit. 21, §701.5, p.4 supra. The Court of Criminal Appeals recognized the importance of this provision when it ruled that "[a]ny attempt by this Court to delineate [a disproportionality standard] . . . would be equivalent to substantive legislation." Williams v. State, supra, 542 P.2d at 593. The Court's decision thus abolishes a procedure for demonstrating that a particular defendant's sentence is "disproportionate" (whatever the Legislature intended by this term).

It is established that the Due Process Clause imposes restraints upon courts which are identical to those imposed on legislatures by the Ex Post Facto Clause. Bouie v. Columbia, 378 U.S. 347 (1964).[13/] The Court should grant certiorari to determine

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13/ "The logical import of Bouie was . . . to extend the ex post facto principle in all its ramifications to any change in the law, whether wrought by legislative amendment, judicial construction, or administrative reinterpretation, which is applied retroactively so as to deprive a criminal defendant of fair notice not only of the criminal nature of his act but also of the punishment to which he will be subject upon conviction." Love v. Fitzharris, 311 F. Supp. 702, 703 (N.D. Cal. 1970).

whether the Oklahoma Court of Criminal Appeals' affirmance of the death sentence in this case subjected petitioner to unconstitutional punishment under the Ex Post Facto and Due Process Clauses.

III.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE IMPOSITION AND CARRYING OUT OF THE SENTENCE OF DEATH FOR THE CRIME OF MURDER UNDER THE LAW OF OKLAHOMA VIOLATES THE EIGHTH OR FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

This Court has heretofore granted certiorari and scheduled oral argument in five cases raising cognate questions under the respective capital-punishment procedures of the States of Florida, Georgia, Louisiana, North Carolina and Texas. Proffitt v. Florida, No. 75-5706; Gregg v. Georgia, No. 74-6257; Roberts v. Louisiana, No. 75-5844; Woodson & Waxton v. North Carolina, No. 75-5491; Jurek v. Texas, No. 75-5394. See also Fowler v. North Carolina, No. 73-7031. In the following subsections, we describe the incidents of Oklahoma law and practice which frame similar issues meriting review in petitioner's case.

A. The Perpetuation of Arbitrary Selectivity Under the 1973 Oklahoma Capital Punishment Statute.

Despite the enactment of new death-sentencing procedures in 1973 and their partial invalidation by the Court of Criminal Appeals in 1975, Oklahoma law continues to offer a broad array of discretionary outlets through which the actual infliction of death can be avoided in potentially "capital" cases and, conversely, a capriciously selected random number of "capital" defendants can be doomed while their indistinguishable counterparts are spared.

1. Prosecutorial Charging Discretion

Felony prosecutions in Oklahoma may be initiated by indictment or by information.[14] In the "vast majority of cases, criminal prosecutions are by information." Stone v. Hope, 488 P.2d 616 (Okla. Cr. App. 1971). The county attorney has "full and complete authority to say when an information shall be filed in a felony case." Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 410 (1938). It is his duty "to guard the interests of the state, and the public, and as a quasi judicial officer to determine, before an action is filed, whether or not matters complained of constitute an offense against the state." State v. Snelson, 13 Okla. Cr. 88, 162 p. 444, 445 (1917). His decision not to prosecute may not be superceded by the complainant, Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947) or by the courts, Best v. Evans, 297 P.2d 379 (Okla. Cr. App. 1956); Ex parte Lewis, 85 Okla. Cr. 322, 188 P.2d 367, 383 (1948); Grimes v. State, 65 Okla. Cr. 99, 83 P.2d 210 (1938).[15]

His decision to proceed may of course be checked if, upon preliminary hearing, a judge determines "either that a public offense has not been committed, or that . . . there is not sufficient cause to believe the defendant guilty thereof." 22 Okla. Stat. Ann. §262 (1969). The consequent dismissal of an information is appealable by the prosecution, State ex rel. Fallis v. Caldwell, 498 P.2d 426 (Okla. Cr. App. 1972); and such a dismissal is also no bar to the prosecutor's refiling of an information and presenting additional evidence at a second preliminary hearing.

14/ Okla. Constitution Ann., Art. 2 §17 (1952), 22 Okla. Stat. Ann. §301 (1969).

15/ Although the grand jury might indict where the prosecutor fails or declines to proceed, it is limited in jurisdiction, 22 Okla. Stat. Ann. 338, and poorly equipped to investigate crimes and to institute prosecutions on its own initiative.

Jones v. State, 481 P.2d 169 (Okla. Cr. App. 1971); Harper v. District Court, 484 P.2d 891 (1971); Nicodemus v. District Court, 473 P.2d 312 (Okla. Cr. App. 1970).[16/]

Oklahoma prosecutors are entrusted with the choice of charges upon which to proceed:

> "it was discretionary with the prosecuting attorney to elect before trial for which offense he would prosecute the accused, where the evidence showed the commission, by the same act or transaction, of more than one offense."

Saxon v. State, 19 Okla. Cr. 58, 198 P.107, 108 (1921). See also State v. Sowards, 64 Okla. Cr. 430, 82 P.2d 324 (1938). Compare Winfield v. State, 44. Okla. Cr. 232, 280 P.630, 632 (1929) ("'[i]t is the privilege of the county attorney to charge in an indictment the highest possible offense constituted by any act committed, but if he sees fit to charge a lower offense which is sustained by the evidence and which calls for the infliction of a lesser degree of punishment, a defendant cannot be heard to complain . . . .'"), with Stough v. State, 75 Okla. Cr. 62, 128 P.2d 1028, (1942) ("what charges should be filed against an individual is a matter for the discretion of the county attorney, but where the line of demarcation between offenses has a narrow margin, the safe practice, where the proof is uncertain is to charge the lesser offense"). The decision to proceed on lesser charges is therefore no more subject to challenge than the decision not to prosecute at all. And while the prosecutor's decision to modify a charge by amendment or by dismissal and refiling requires court approval in all cases of dismissal and in cases of amendment after the defendant has pleaded, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), traditionally the

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16/ Dismissals for failure to prosecute promptly, 22 Okla. Stat. Ann. §812 (1969) also do not bar reprosecution for the same offense. 22 Okla. Stat. Ann. §817 (1969).

prosecutor can expect approval where requested, see Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280 (1947), quoted at p. 25, infra.

It is against this background that State v. Hanna, 540 P.2d 1190 (Okla. Cr. App. 1975), was decided. In that case, the Court of Criminal Appeals took a state appeal from dismissal of an information charging murder in the first degree[17/] as an occasion to announce that the prosecutor's subsequent filing of a second-degree amended information was improper.

> "In conformance with our recent holding in State ex rel. Young v. Warren, Okla. Cr., 536 P.2d 965 (1965), we are of the opinion that the state's action in filing an amended information charging murder in the second degree also was erroneous, and the trial court is directed to enter an Order dismissing said information without prejudice to the State's filing a preliminary information, if it elects to do so."

540 P.2d at 1191. Hanna does not preclude amendment or dismissal, see 22 Okla. Stat. Ann. §§304, 815 (1956), and refiling lesser charges where the prosecutor is able to present evidence that the lesser offense occurred and fails to present evidence (which, assuredly the defendant has no motivation to present) that the defendant is guilty of murder in the first degree. Nor does Hanna bar the prosecutor from refiling and presenting evidence of defenses qualifying or contradicting the evidence of first degree murder presented at the initial preliminary hearing. The enforceability of the Hanna "rule" is doubtful in any case, since no party has reason to complain of a nonconforming amendment; and where there is not (as there was in Hanna) a fortuitous interlocutory appeal proceeding in which the prosecutor seeks simultaneously to justify his original charging decision while abandoning it, there

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17/ The trial court had been of the view that "armed robbery could not be committed with an electric iron, an electrical cord and heavy boots." The appellate court disagreed. Id. at 1191. Mr. Hanna was subsequently tried for murder in the first degree and convicted of manslaughter in the first degree, State v. Hanna, District Court, Cleveland County, No. CRF-75-496.

is no reason for any court to question whether his refiling reflects something more or less than his reassessment of the available evidence. Such judicial inquiry is the more unlikely inasmuch as the courts are without authority to require a capital prosecution; they can only (once again, as in Hanna) order dismissal of the less serious charge. Finally, Hanna deals merely with refilings; it neither does nor can restrict or regulate the prosecutor's initial charging determination; that determination remains as wholly discretionary and unaccountable as ever. The upshot is that an Oklahoma prosecutor retains complete and uncontrolled freedom in his original choice to charge or forgo charging a capital offense; and thereafter he retains considerable leeway, limited only by a vague[18/] and virtually unenforceable directive of the Court of Criminal Appeals, to reconsider and alter his original choice.[19/]

2. Plea Bargaining

The plea bargain, which accounts for up to ninety percent of all criminal convictions in the nation[20/] and is "used quite extensively in Oklahoma,"[21/] is also predominantly a matter of prosecutorial discretion. Although court approval is required

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18/ See note 35 infra.

19/ For all of the reasons that we have set forth in the text, the Hanna decision of the Court of Criminal Appeals effected no significant limitation of prosecutorial charging discretion in Oklahoma Capital Cases. Like the Young and Murray decisions discussed at pp. 25 - 28 , 29 - 36 infra, Hanna is essentially a cosmetic pronouncement which lacks operational substance. Nevertheless, we may also note that, since Hanna was not decided until September 19, 1975, it could not even arguably have affected the prosecutorial charging practices in use at the time that petitioner's case was "papered" as capital first degree murder.

20/ PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURTS 9 (1967).

21/ Note, Plea Agreements in Oklahoma, 22 OKLA. L. REV. 81, 83 (1969).

for the dismissal, partial dismissal or amendment required to allow a plea to a lesser charge, 22 Okla. Stat. Ann. §304 (1958), 22 Okla. Stat. Ann. §815 (1969), the county attorney "is the legal representative of the state charged with the responsibility of investigating and prosecuting all public offenses, [and] the trial judge will ordinarily accept his recommendation and dismiss the action." Perry v. State, 84 Okla. Cr. 211, 181 P.2d 280, 286 (1947).

It is true that, in an interlocutory proceeding brought to challenge trial court orders changing venue and granting bail in a capital case,[22] the Court of Criminal Appeals noted that plea discussions had been had and thereupon announced that guilty pleas to lesser charges could not be entered in a capital case unless the State established "by competent evidence" "that the defendant . . . was guilty of the lesser included offense, and not Murder in the First Degree," State ex rel. Young v. Warren, supra, 536 P.2d 965, 971[23] (1975).[24] The Young opinion leaves unclear whether the State is required to convice the court of the defendant's guilt of the lesser and innocence of the greater charge, or merely to show that there is sufficient evidence to raise a question as to which crime was committed. But surely no party to a

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22/ State ex rel.Young v. Warren, supra, Application and Petition dated March 7, 1975 (Okla. Ct. of Cr. App.No.O-75-103.)

23/ See pp. 14-15 supra. This felony-murder prosecution, involving six codefendants, resulted in two discharges on the basis of grants of immunity. Id. at 968, two death sentences, State v. Henson, Muscogee County District Court, No. CRF-74-355 (1975), State v. Bias, Creek County District Court, No. CRF-74-123 (1975), and two pleas to manslaughter in the first degree after testimony that the defendants were intoxicated at the time of the offense. State v. Gregory, Creek County District Court. No. CRF-74-123 (1975); State v. Gibson, Creek County District Court, No. CRF-74-123 (1975).

24/ At the same time, the court specifically announced that grants of immunity, see, Okla. Constitution Ann., Art. 2 §27; 21 Okla. Stat. Ann. §1367, remained acceptable in capital and in non-capital cases. See note 23, supra.

proposed plea agreement will be motivated to contest the sufficiency of evidence that the defendant is guilty only of the lesser offense. Enforcement of the Young "rule," like the Hanna "rule," supra, therefore depends upon a decision of the trial judge to make an unsolicited, independent evaluation of the facts of the case -- or upon the initiation of an unrelated incidental proceeding which might provide the occasion for an appellate pronouncement.

Whether for this reason or because (as we shall see at note 35 infra) the imponderable quality of the legal elements that set off first degree murder from its lesser included offenses ordinarily makes it impossible for a trial court to rule out the propriety of a less-than-first-degree-murder conviction, the fact is that plea bargaining continues in Oklahoma capital cases after and notwithstanding Young. Indeed, in an informal survey limited in time and resources, counsel have been able to document fourteen (14) plea bargains in capital cases since Young:

> Jerry Wayne Freeman, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.
>
> Dean Joseph Odom, charged with murder in the course of an armed robbery, District Court, Oklahoma County, No. CRF-75-3077, pleaded guilty on March 8, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.
>
> Charles Edward Anderson, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRF-75-1081, pleaded guilty on January 22, 1976 to first degree manslaughter and was sentenced to forty years imprisonment.
>
> William Eugene Craine, charged with murder in the course of committing armed robbery, District Court, Comanche County, No. CRF-75-1081, pleaded guilty on January 22, 1976 to manslaughter in the first degree and was sentenced to forty years imprisonment.
>
> Richard Allen Pinkinpaugh charged with murder for hire in the District Court, Oklahoma County, No. CRF-74-1542 pleaded guilty on January 13, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Gary Dale Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Raymond Lee Turner, charged with first degree murder, District Court, Ottawa County, No. CRF-75-646, pleaded guilty on January 12, 1976 to second degree murder and was sentenced to fifty years to life imprisonment.

Phillip Brandon Ervin, charged with murder in the course of armed robbery, District Court, Cleveland County, No. CRF-75-87, pleaded guilty on May 27, 1975 to manslaughter in the first degree and was sentenced to twenty years imprisonment.

Kenneth Eugene Harwell, charged with murder in the course of robbery with firearms, Oklahoma County District Court, No. CRF-75-60, pleaded guilty on November 19, 1975 to manslaughter in the first degree and was sentenced to ten years imprisonment.

Charles Henry Hilliard, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on November 13, 1975 to manslaughter in the first degree and was sentenced to seven years, three to be served in the penitentiary and the remainder to be suspended.

Glen Raymond Parker, charged with murder in the course of committing robbery with firearms, District Court, Oklahoma County, No. CRF-75-2216, pleaded guilty on September 29, 1975 to murder in the second degree and was sentenced to ten years to life imprisonment.

Allen Clayburn Justus, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-109, charge dismissed June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF 74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Bobby Joe Williams, charged with murder in the course of an armed robbery, District Court, Lincoln County, No. CRF-73-108, charge dismissed, June 12, 1974, and refiled on the same day in an information charging second degree murder, District Court, Lincoln County, No. CRF-74-57, pleaded guilty on June 12, 1974 to second degree murder and was sentenced to ten years to life imprisonment.

Richard Sonny Erwin, charged with murder of a child, District Court, Pottawatomie County, No. CRF-75-181, pleaded guilty on January 9, 1976 to murder in the second degree and was sentenced to ten years to life imprisonment.

Whether the prosecutorial decisions to make these compromise dispositions were based exclusively upon an evidentiary showing that the crimes in each case were "not Murder in the First Degree" as initially charged, State ex rel. Young v. Warren, supra, 536 P.2d at 971, is, in the nature of the plea-bargaining process, an inscrutable question. Obviously, however, the defendants would have little incentive to charge-bargain in cases where the evidence could only make out less than first degree murder. So it is most likely that post-Young bargains are being made -- as plea bargains have always been made in Oklahoma -- upon a broader basis that includes consideration of the nature of the crime,[25] "the age, record, attitude, and mental condition of the accused," "the strength of the prosecutor's case and the identity of his witnesses"[26] and the philosophy and attitudes of the local prosecutor.[27] [28]

25/ Note, Plea Agreements in Oklahoma, 22 Okla. L. Rev. 81, 83 (1969).

26/ Id. at 84.

27/ Id. at 83:

> "One prosecuting attorney said that he simply would not negotiate with one who is accused of [murder]; . . . however, another prosecuting attorney said that due to the unpredictability of juries, no matter how serious the crime, he will consider a negotiation to make sure that the accused gets some kind of punishment."

28/ In addition, we may note that the Young case was not decided until May 7, 1975. See note 19 supra.

3. Jury Discretion

An Oklahoma jury may, in any case,

> "find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged. . . ." 29/

Multiple-count indictments or informations charging offenses of varying severity in the alternative are authorized, 30/ under which the jury may convict of lesser offenses not technically "included" in the greater. The only limitation upon a capital jury's power in these regards is defined by §701.3 of the 1973 capital punishment statute (pp. 3-4, 11-12 supra), which forbids the submission of evidentially unsupported lessers, Murray v. State, 528 P.2d 739, 740-741 (Okla. Cr. App. 1974), and provides that a trial judge who instructs the jury upon "lesser and included offenses and lesser degrees of homicide . . . shall state into the record his reasons for giving the instructions based upon the evidence adduced at trial."

29/ Okla. Stat. Ann. tit. 22, §916. See also, 22 Okla. Stat. Ann. §915:

> "Whenever a crime is distinguished into degrees, the jury, if they convict a defendant, must find the degree of the crime of which he is guilty."

30/

> "[A]n indictment or information must charge but one offense, but where the same act constitutes different offenses, or the proof may be uncertain as to which of the two or more offenses the accused may be guilty of, the different offenses may be set forth in different forms or degrees under different counts."

22 Okla. Stat. Ann. §404 (1969).

The Murray case just cited was -- like the Hanna and Young cases previously discussed[31] -- an opinion in which the Oklahoma Court of Criminal Appeals pronounced its views upon an issue neither presented nor argued before it, in an apparent concern to ease the tension between Furman and the 1973 law. Two jointly tried defendants, indicted for first degree murder and convicted of second degree murder, urged upon appeal that their pretrial motions for a severance and separate trials had been improperly denied. They prevailed on this contention, and therefore secured reversal of their convictions. The Court of Criminal Appeals added:

> "From a review of the record we further find that the trial court instructed the jury on the offense of Murder in the Second Degree, this being the crime for which the defendants were convicted. It is our opinion, and we so hold, that the evidence in this case did not warrant a Second Degree Murder instruction. The evidence presented was that there was an armed robbery and a homicide. Under this evidence the defendants were either guilty of Murder in the First Degree, or nothing. . . . Therefore, on a retrial of this matter, the trial court should not instruct the jury on the offense of Murder in the Second Degree."

528 P.2d at 740-741. Perhaps because of the way in which the issue arose (or, more accurately, did not arise) in Murray, the court not merely overlooked the impossibility of retrying the

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31/ See pp. 23-28 supra.

defendants for first degree murder,[32] but also failed to explain how -- in any live controversy upon a concrete factual record -- an Oklahoma trial or appellate court could rule as a matter of law that the evidence does not warrant a less-than-first-degree murder instruction. For under Okla. Stat. Ann. §701.1 (1975-1976 Supp.), pp.2-3 supra, neither robbery-murder nor murder in any of the two enumerated statutory situations constitutes first degree murder unless it is also premeditated; and the presence or absence of the mental state of premeditation is a jury question. It was for this reason, for example, that the trial judge in petitioner's case charged the jury on first degree manslaughter (see pp. 7 - 8 supra), although petitioner had killed a police officer within §701.1(1).

32/ See Price v. Georgia, 398 U.S. 323 (1970). In the case of Murray's codefendant, indeed, the United States District Court for the Western District of Oklahoma has already held that double jeopardy bars the retrial "on the charge of Murder in the First Degree" ordered by the Court of Criminal Appeals in Murray v. State, supra, 528 P.2d at 741. See Grizzle v. Turner, 387 F. Supp. 1 (W. D. Okla. 1975).

Murray does not purport to change the settled law of Oklahoma that, in homicide cases, the court must submit to the jury an instruction upon every degree of homicide which any reasonable view of the evidence suggests, Isaac v. State, 83 Okla. Cr. 33, 172 P.2d 806, 808-809 (1946);[33] that the judge is not to weigh the evidence in formulating his instructions, Lawson v. Territory, 8 Okla. 1, 56 P. 698, 700 (1899);[34] that "[w]here the evidence shows any element of manslaughter, however slight, an instruction defining that degree of homicide is proper," Ging v. State, 31 Okla. Cr. 428, 239 P. 685, 688-689 (1925); that "if there is any doubt about the matter in the mind of the court, the lower degree of the homicide should be submitted for the consideration of the jury," Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 383 (1942); that lesser-offense submissions will be sustained even upon "rather a strained construction" of the evidence, Warren v. State, 6 Okla. Cr. 1, 115 P. 812, 817 (1911); that factual questions regarding a defendant's

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33/ Lesser-offense instructions may be required by the evidence even in the absence of a defense request. See, e.g., Myers v. State, 480 P.2d 950, 952 (Okla. Cr. App. 1969).

34/ Thus, for example, the uncorroborated testimony of a defendant suffices to support and require a lesser-offense charge. Shirey v. State, 520 P.2d 701, 703 (Okla. Cr. App. 1974).

mental state are ordinarily jury issues requiring submission of lesser-offense instructions, Laymon v. State, 513 P.2d 883, 885 (Okla. Cr. App. 1973); Gibson v. State, 501 P.2d 891, 899-900 (Okla. Cr. App. 1972); and, in particular, that any "reasonable doubt . . . as to whether or not the killing was committed with a premeditated design to effect . . . death" supports a lesser offense instruction, Jones v. State, 523 P.2d 1126, 1132 (Okla. Cr. App. 1974) -- even where, as in Jones, the defendant's version of the relevant events is that he was out of the room when his alleged victim committed suicide. In the framework of these principles, it will be the rare case, if any, where the element of "premeditated design" that is prerequisite to a capital first degree murder conviction will not require factual resolution by the jury and support a lesser-offense instruction, thus performing its historic office of "giving [the jurors a] . . . dispensing power [veiled] . . . in a mystifying cloud of words," CARDOZO, LAW AND LITERATURE 100 (1931). For this element "is so obscure that no jury hearing it for the first time can fairly be expected to understand it," ibid.; 35/ and it therefore represents

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35/ The elements which define first degree murder, second degree murder, and manslaughter are exceedingly amorphous. First degree murder (and one form of second degree murder) are characterized by a "premeditated design to . . . effect death." Okla. Stat. Ann. tit. 21, §§701.1, 701.2(1)(1975-1976 supp.). "Design" and "Premeditation" are statutorily defined:

> "Design to effect death inferred[.] A design to effect death is inferred from the fact of killing, unless the circumstances raise a reasonable doubt whether such design existed"; (Okla. Stat. Ann. tit. 21, §702 (1958));

the classic archetype of those ungraspable mental elements so

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35/ cont'd.

> "Premeditation[.] A design to effect death sufficient to constitute murder may be formed instantly before committing the act by which it is carried into execution"; (Okla. Stat. Ann. tit. 21, §703 (1958)).

The Court of Criminal Appeals has frequently discussed the concept of "premeditated design":

> "'A premeditated design under our law need not be entertained for any appreciable length of time. It may be a design formed instantly before committing the act by which it is carried into execution . . . The time requisite to constitute premeditated design may not be distinguishable from the act of the killing, although it may be said to precede the act . . . Premeditation is an intent before the act of killing. It means entertainment by the mind of a design to kill, and is often defined as "thought of beforehand, any length of time, however short." However, the word "premeditatedly" does not mean "thought of" in the sense of "thought over."'"

Easley v. State, 78 Okla. Cr. 1, 143 P.2d 166, 170 (1943)(quoting Basham v. State, 47 Okla. Cr. 204, 287 P. 761, 762 (1930)). Moreover, "'[a] premeditated design to effect death * * * is no more nor less than a mental purpose to take human life.'" Walker v. State, 91 Okla. Cr. 1, 214 P2d. 961, 963 (1950). This mental purpose is "'"formable on the instant preceding the fatal act or some time theretofore, it being sufficient that there be a precedent existence of the purpose and persistency of it to and inclusive of such fatal act."'" Easley v. State, supra, 143 P.2d at 171. See also Jones v. State, 94 Okla. Cr. 359, 236 P.2d 102, 107 (1951); Miller v. State, 523 P.2d 1118, 1122 (Okla. Crim. App. 1974)(defendant could have formed premeditated design to kill between firing second and third pistol shot while he engaged in drunken horseplay). Moreover, "[i]f a killing is occasioned by the use of a deadly weapon, then the design to effect death may be inferred from the fact of the killing." Gatewood v. State, 80 Okla. Cr. 135, 157 P.2d 473, 475 (1945).

A similar gloss does not exist for the element defining one form of second degree murder, "a depraved mind, regardless of human life," see Holmes v. State, 6 Okla. Cr. 541, 119 P. 430, 440 (1911), although Okla. Stat. Ann. tit. 21, §705 (1958) provides that a homicide perpetrated by an act "imminently dangerous to others and evincing a depraved mind, regardless of human life, is not the less murder because there was no actual intent to injure others." See generally, CANNON, AN ANALYSIS OF THE NEW MURDER LAW OF OKLAHOMA (1974).

"refractory to the best-instructed human understanding" [36] that they not merely permit but inescapably require any jury to "conceal from itself its own response to sentiment, under the guise of resolving issues of evidential doubt." [37]

> "[N]o matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve lay persons have no alternative to using their general sense of the equities of the matter. But this means that these purported rules, at the crucial line of separation between those who are to die and those who are to live, conceal a discretion which, however benevolent, is to all intents and purposes standardless." [38]

And if "'[i]t sometimes happens [that] the jury, in arriving at a verdict, does so by a compromise and fixes a lower degree than the undisputed evidence may disclose,'" Abel v. State, 507 P.2d 569, 572 (1973), (quoting Clapp v. State, 73 Okla. Cr. 261, 120 P.2d 381, 384 (1941)), surely this extra-legal process is most likely to reflect the "natural human tendency to see

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36/ Black, Crisis in Capital Punishment, 31 MD. L. REV. 289, 299 (1971).

37/ KALVEN & ZEISEL, THE AMERICAN JURY 427 (1966).

38/ BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 49-50 (1974).

facts and to evaluate evidence in a manner leading to a desired conclusion"[39] where the stakes are life or death[40] and where the enormity of those stakes is forcibly brought home to the jurors by the requirement that they "state affirmatively in their [first degree murder] verdict that the defendant shall suffer death."[41]

39/ BLACK, op. cit. supra note 38, at 46.

40/ The resort by juries even to verdicts of acquittal as a means of avoiding capital convictions" in cases which were 'willful, deliberate, and premeditated' in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty" is an historical commonplace. McGautha v. California, 402 U.S. 183, 199 (1971). See the authorities collected in the Brief for Petitioner, Fowler v. North Carolina, No. 73-7031, at pp. 90-92 n.122.

41/ Okla. Stat. Ann. tit. 21, §701.3 (1975-1976 Supp.), p. supra. The Court of Criminal Appeals has indicated that the omission of such a statement would not have the legal effect of sparing the defendant's life, Williams v. State, supra, 542 P.2d at 578-79, but the requirement serves nonetheless to assure that the jury is aware of the life-or-death consequences of its choice of a verdict.

4. Executive Clemency

Under Okla. Const. Ann., art. 6, §10 (1952), and 57 Okla. Stat. Ann. §332 (1969), the Governor of Oklahoma possesses absolute power to commute and pardon -- or to decline to commute or pardon -- as he chooses. The only limitation upon these powers as they apply to capital cases is the requirement that, before the Governor may permanently change a sentence to be served, he must receive a recommendation in the case from the Board of Pardons and Paroles. He need not follow the recommendation, but need only receive it. There are no restrictions or controls upon -- or standards, rules or principles to regulate -- the Board's discretion or the Governor's. "An abuse of the pardoning power [which is conferred in the same terms as the power of commutation] does not authorize the courts to decline to give effect to a pardon, and no court has the power to review the action of the executive in granting a pardon . . . . "Ex parte Crump, 10 Okla. Cr. 133, 135 P.428, 431 (1913).

Since the Court now has before it lengthy briefs in cases from five States raising the question of the constitutionality of capital punishment under the Eighth Amendment, we see no reason to extend the present Petition beyond description of the local Oklahoma doctrines, practices and procedures that present a similar question in petitioner's case. Oklahoma's system for the administration of the death penalty differs in details from those of Florida, Georgia, Louisiana, North Carolina, and Texas -- just as the systems of the latter five States differ from each other in details -- but the differences are insignificant in contrast to the similarities. Arbitrary selectivity in

the choice of those who die or live remains the common characteristic of death-sentencing schemes from State to State, after Furman as before, and however much the numerous discretionary judgments which together doom or spare be diffused, disguised, or papered over with the language of "mandatory" or "automatic" death penalties. For, in fact,

> "[t]he change to a mandatory system . . . [simply has] the effect of shifting some of the discretion exercised by the jury [before Furman] to others, particularly the prosecutor and the executive. By obscuring the visibility of the discretionary judgments, this change can only increase the potential for arbitrary and discriminatory application of the death penalty."42/

B. The Excessive Cruelty of the Death Penalty

This aspect of the Eighth Amendment question presented here is identical to the questions raised in the Fowler, Proffitt, Gregg, Roberts, Woodson-Waxton and Jurek cases, p. 20 supra, and discussed particularly in the respective Parts III of the Briefs for Petitioner in Fowler (No. 73-7031) and Jurek (No.75-5394).

42/ White, The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment, 13 DUQ. L. REV. 279, 289 n.69 (1974). See also BLACK, op. cit. supra note 38, at 92-93.